SUPREME COURT, U. S.

No. 1046

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the United States District Court for the District of Columbia dismissing a complaint to set aside an order of the Interstate Commerce Commission. Appellant submits this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 260 F. Supp. 386 (adv. sheets), and a copy is attached hereto as Appendix A. A copy of the report on further considera-

tion, and order of the Interstate Commerce Commission, division 1, in *New York Central Transport Company Extension—Oakbrook, Ill.*, 99 M.C.C. 94, is attached as Appendix B. A copy of division 1's earlier report on reconsideration, and order, 92 M.C.C. 173, is attached as Appendix C. The report of the Commission's Operating Rights Review Board, dated August 10, 1962, 91 M.C.C. 161, and the report and recommended order of the Commission's Hearing Examiner, served March 16, 1962, are attached as Appendices D and E, respectively.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on October 19, 1966, and notice of appeal was filed December 15, 1966. This Court has jurisdiction under 28 U.S.C. §§ 1253 and 2101(b) to review the decision below on direct appeal; *United States* v. *Drum*, 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *Western Pacific Railroad Co.* v. *United States*, 382 U.S. 237.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, in the absence of "special circumstances" such as those disclosed in *American Trucking Associations, Inc.* v. *United States*, 355 U.S. 141, may authorize a railroad subsidiary to conduct motor-carrier operations not restricted to service auxiliary and supplemental to that of its rail parent?

2. Whether, in view of the provisions of the National Transportation Policy requiring "fair and impartial regulation of all modes of transportation" and the preservation of "the inherent advantages of each," the Commission, while requiring independent motor carriers to prove public convenience and necessity for their proposed service, may allow a railroad subsidiary to provide motor service to the same shipper without conforming to the same statutory standards?

3. Whether the Commission's report and order, and the decision of the district court upholding them, ignore this Court's decision in *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1, and are contrary to Congressional policy against rail entry into the motor-carrier field, and a long line of Commission and court decisions interpreting and applying that policy?

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C., preceding §§ 1, 301, 901, and 1001, and Sections 1(18), 5(2)(a) and (b), 202(c)(2), 206(a)(1) and 207(a) of the Interstate Commerce Act, 49 U.S.C. §§ 1(18), 5(2)(a) and (b), 302(c)(2), 306(a)(1), and 307(a), are set forth in Appendix F hereto.

STATEMENT

Eastman Kodak Company for many years maintained its Midwestern headquarters in Chicago. Recently, Eastman built a new plant at Oakbrook, Ill., a point 2½ miles outside the Chicago commercial zone. Twenty-eight independent motor carriers and two railroad motor-carrier subsidiaries[1] filed applications to provide truck service to the new Oakbrook plant. Nearly all the independent motor carriers and the two rail affiliates had served Eastman at its Chicago plant. The applications were consolidated and heard by a Commission hearing examiner. The applications of Transport Company and Motor Transit were protested by appellant and Consolidated Freightways Corporation of Delaware, and an affiliate of the latter, New York Consolidated Freightways Cor-

[1] New York Central Transport Company (hereinafter Transport Company), a wholly-owned subsidiary of the New York Central Railroad, and Rock Island Motor Transit Co. (hereinafter Motor Transit), a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railroad.

poration, the latter two protests being subsequently withdrawn.

By report and order served September 8, 1961 (Docket No. MC-82, Sub-No. 11, *Best Way of Indiana, Inc., Extension—Oakbrook, Ill.*, not printed), the hearing examiner recommended that appropriate authority be issued to the twenty-eight independent motor carriers [2] to serve the new Eastman plant. He indicated that separate consideration would be given to the applications filed by the rail affiliates. On March 16, 1962, the examiner issued his report and order in Docket No. MC-67916 (Sub-No. 20), *New York Central Transport Company Extension—Oakbrook, Ill.*, which also embraced the application of Motor Transit, Docket No. MC-29130 (Sub-No. 92). He recommended that both applications be denied. Specifically, he found Oakbrook to be a non-rail point and that the rail-affiliates had failed to show that "special circumstances" warranted a grant of authority to serve it. (App. E, pp. 71-72).

The rail subsidiaries and Eastman filed exceptions to the examiner's report (Eastman only to the denial of Transport Company's application) and appellant replied. On August 15, 1962, the Commission's Operating Rights Review Board issued its report and order, upholding the hearing examiner's recommendations, 91 M.C.C. 161 (App. D). The board agreed with the hearing examiner that Oakbrook is a non-rail point and that applicants had not established that "special circumstances" warranted a grant of authority to serve it. 91 M.C.C., at 163-164 (App. D, pp. 60-61).

Motor Transit and Transport Company filed petitions for reconsideration of the Review Board's report and order, and appellant again replied. The Commission's Divi-

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[2] Twenty-seven such carriers were ultimately certificated, almost 19 months before Motor Transit's certificate was issued.

sion 1, in its report served June 28, 1963, reversed the examiner and the Review Board and granted the authority. The division agreed that both the rail-affiliated applicants were required to prove "special circumstances" to justify a grant of authority to serve Oakbrook; but went on to hold that Eastman's desire for their service (in addition to the service of the 27 independent motor carriers already authorized to serve Oakbrook) was sufficient to meet that burden. 92 M.C.C. 176-178 (App. C, pp. 51-54).

Appellant then unsuccessfully petitioned for reconsideration by division 1 of its report and order, and for a finding by the entire Commission of "general transportation importance." Having exhausted its administrative remedies before the Commission, appellant filed complaint in the District Court on April 8, 1964, seeking permanently to enjoin and set aside the Commission's report and order. The United States was named as a party defendant pursuant to Section 2322 of the Judicial Code, 28 U.S.C. § 2322. Motor Transit and Transport Company intervened as defendants in support of the Commission, and filed separate answers to the complaint.

On the same day complaint was filed, the Commission issued a certificate of public convenience and necessity to Motor Transit, authorizing it to transport general commodities, with certain exceptions, serving the plant site of Eastman at Oakbrook, as an off-route point in connection with its authorized regular route operations between Chicago and Silvis, Illinois.

By order served June 25, 1964, the Commission, on its own motion, reopened the proceedings for reconsideration. The district court entered an order on June 26, 1964, postponing all further proceedings. The Commission held no additional hearings, but reconsidered the matter on the basis of the record already made. In its report on further consideration (App. B), Division 1 granted Motor Transit's application, finding "special cir-

cumstances"[3] to be present, because no motor carrier holding competitive authority opposed the application and there was no indication that any motor carrier is able or willing to serve those points which Motor Transit is authorized to serve and has been serving in the past, 99 M.C.C. 99-100 (App. B, pp. 37-38). Finding that Transport Company's operations were, in substance, an integral part of its parent railroad's "piggyback" service, the division held that Transport Company could serve Oakbrook without motor carrier authority.

Appellant again unsuccessfully petitioned for reconsideration by division 1 of its report and order on further consideration, and for a finding by the entire Commission of "general transportation importance," once more exhausting its administrative remedies.[4]

On December 13, 1965, appellant filed a supplement to the original complaint, requesting that the division's final report be set aside. The Commission answered our original complaint and supplement thereto. Intervening defendants filed separate answers to the supplement to the complaint. The United States filed a separate answer to the complaint and supplement, saying it "neither admits nor denies the allegations thereof" and "neither supports nor opposes the order of the Commission."

The district court dismissed the complaint, holding that the Commission correctly concluded that "special circumstances" justified the grant of Motor Transit's application. It also affirmed the Commission's holding that Transport Company needed no motor-carrier authority to serve

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[3] Commissioner Murphy dissented, challenging the propriety of the majority's finding that Motor Transit had established the existence of "special circumstances." 99 M.C.C., at 103 (App. B, pp. 42-43)

[4] Thus, despite the important Congressional policy involved, the entire Commission treated this case as a purely routine matter, twice refusing the opportunity for a full-dress review of its division's action.

Oakbrook, since Oakbrook, "though not a rail point," is "described in a New York Central tariff, [and] is within that railroad's homogeneous terminal area at Chicago." 260 F. Supp., at 390 (App. A, p. 29).

THE QUESTIONS ARE SUBSTANTIAL

This case involves an administrative agency's refusal to adhere to its own well settled interpretation of Congressional policy, one which has only recently received this Court's approval.

In 1954, the Commission, as it had in numerous prior cases, referred to its long-followed policy of limiting trucking operations of railroads or their affiliates to "auxiliary and supplemental" service. Although it departed from the policy in that proceeding, it solemnly announced: [5]

> This policy was and is sound and should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, *which the authorized independent motor carriers have not furnished, except where it suited their convenience.* (Emphasis supplied)

The Commission's decision was upheld by a three-judge district court (*American Trucking Assn's., Inc.* v. *United States*, 144 F. Supp. 365 (1956)), and the district court's decision was affirmed by this Court, 355 U.S. 141 (1957). But both courts made it plain that the sole basis for upholding the grant of unrestricted motor rights to the rail subsidiary there involved was "exceptional circumstances," i.e., the failure of the independent motor carriers in the area to render adequate service. In fact, this Court took

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[5] *Rock Island Motor Transit Co. Common Carrier Application*, 63 M.C.C. 91, 102 (1954).

pains to emphasize that "[s]hould the Commission prove to be less stringent in the future, appellants not only have recourse to the Congress, but also to the courts for review of the Commission's finding that 'special circumstances' exist." *Id.*, at 152.

And when the Commission, shortly after this Court's approval of its grant of unrestricted rights to the rail affiliate in the cited case, sought to deviate from the "special circumstances" doctrine it there adopted, this Court was quick to call a halt. In that case, *Pacific Motor Trucking Co.—Extension—Oregon*, 77 M.C.C. 605 (1958), another railroad's motor subsidiary was awarded unrestricted trucking rights, despite its failure to demonstrate any unwillingless or inability on the part of independent motor carriers to provide the service sought. Although the Commission's decision was upheld by the United States District Court for the District of Columbia (*American Trucking Assn's., Inc.* v. *United States*, 170 F. Supp. 38 (1959)), this Court reversed, 364 U.S. 1 (1960).* In its opinion, the Court explicitly recognized the "strong general [Congressional] policy against railroad invasion of the motor carrier field." *Id.*, at 6. It discussed the Congressional attitude reflected by a proviso to § 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(b), and noted that "it is evident that the policy of opposition to railroad incursions into the field of motor carrier service has become firmly entrenched as a part of our transportation law." *Id.*, at 7. In its opinion, the Court twice disclosed what we deem to be its understanding of the limits of the Commission's discretion in cases of this kind: first, when it recalled its earlier *Rock Island* decision "where the trucking service was not being performed adequately by independent motor concerns" (*Id.*, at 11), and second, when noting the "insufficient justifica-

* In view of the similar style of the two cases we will, for convenience, refer to the first mentioned as "*Rock Island*" and the second as "*Pacific Motor*."

tion" for the Commission's action, it stated: "There is, for example, no finding that independent contract carriers [7] were unable or unwilling to perform the same type of service as Pacific Motor." *Id.*, at 14-15.

Viewed in the light of the two important and recent Commission and court decisions referred to,[8] the agency decision, and its affirmance by the court below, cry out for review and reversal by this Court.

1. The grant of authority to Motor Transit does violence to this Court's decision in *Pacific Motor*, *supra*. Here, as there, the agency's decision contains no finding that independent motor carriers were unable or unwilling to provide the service which the rail subsidiary sought to perform. Small wonder, for nowhere in the testimony introduced by the supporting shipper, Eastman, or the rail subsidiary, was such a claim even made. Yet, the agency subverted the important Congressional policy involved, and circumvented the *Pacific Motor* decision, first, by ignoring it and, second, by improperly imposing the burden of proof upon the independent motor carriers, rather than the rail subsidiary, where it belongs.

In its first report, 92 M.C.C. 173, 178 (App. C, pp. 53-54), the division held that "the demonstrated specific need of the shipper, Eastman, constitutes 'special circumstances' in these proceedings." In the second report, 99 M.C.C. 94, 100 (App. B, p. 38), this statement is incorporated by the division's statement affirming "the findings

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[7] The Court had previously noted "that for purposes of the relevance of the § 5(2)(b) standards," there is no difference between rail applications to perform motor common or contract service. *Id.*, at 7.

[8] A spate of additional cases could be cited, all leading to the same result, but we submit that this Court's decisions in *Rock Island* and *Pacific Motor* so clearly delineate the course of action the Commission should have followed here that additional citation would be superflous.

in the prior report that Motor Transit should be granted the authority sought . . ." In *Pacific Motor*, this Court made it quite clear that the desire of a shipper for the services of a railroad subsidiary could not overcome the legal barrier thereto: "If that desire of General Motors, in combination with the policy of the Act, disables a railroad subsidiary from obtaining the business, that is simply the result of the National Transportation Policy (footnote omitted)." 364 U.S. 15 In the absence of any finding of inadequacy in the service of the independent carriers here, there is no more reason to bow to Eastman Kodak's desire than to General Motors in the cited case. If anything, there is much less. Here, Motor Transit is simply one of many motor carriers which have provided truck service to Eastman at its old plant. In *Pacific Motor*, the operations and plants of General Motors and the rail subsidiary were so correlated and interwined (in connection with rail and intrastate motor service) as to result in at least some real business hardship from denial of the interstate motor authority. The shipper there, General Motors, supported this assumption by actively participating throughout the proceedings before the Commission, the district court, and this Court. Here, Eastman didn't even except to the Examiner's report denying the authority sought by Motor Transit, the first of the four separate administrative steps before the Commission.[9] Thus, entirely aside from the Congressional policy here involved, the division's solicitude in proclaiming Eastman's need for the rail subsidiary's service "in order to utilize effectively and economically its new Oakbrook facility." 99 M.C.C., at 100 (App. B, p. 38) has a hollow ring, indeed. To paraphrase an old saw, we submit that Eastman's inaction speaks a lot louder than the Commission's words.

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[9] Eastman did except to the Examiner's denial of authority to the other rail affiliate, Motor Transport, but it did not participate at any further stage of the proceedings before the Commission.

2. In the first report, the division referred to Motor Transit's claim that it did not need to show "special circumstances" to obtain the authority sought, in view of the fact that it had already made such a showing in prior proceedings involving the same general area. The division found this contention "untenable," stating correctly, we believe, that: "The application of any motor carrier, whether a rail affiliate or not, must rest upon its own factual situation," citing the entire Commission's earlier *Rock Island* decision. 92 M.C.C., at 177 (App. C, p. 52). Yet in its second report, the division, in finding "special circumstances" emphasized that its conclusion was "further motivated" because "the instant application is but a slight extension" of the rail subsidiary's existing authority which is "free of the usual restrictions imposed on motor carrier operating rights issued rail affiliates." 99 M.C.C. 100 (App. B, p. 38). There is no word of explanation in the later report to indicate wherein the directly opposite conclusions of the earlier report, and the cited opinion of the entire Commission in *Rock Island*, are in error.

3. The division—in addition to giving improper weight to the shipper's desire for the services of the rail subsidiary—a desire which, as already noted, was not exactly overwhelming, also erroneously transferred the burden of proof from the rail subsidiary to the independent motor carriers and this appellant. It stated:

> In this connection, it is of real significance in a proceeding such as this that the application is not opposed by competing motor carriers but only by ATA which presented no evidence as to the services which competitive motor carriers are ready, willing, and able to provide. (Citing cases) And we may not infer injury to competing carriers in the absence of evidence indicating that present transportation facilities can and are willing to meet the shipper's need for service. 99 M.C.C. 99 (App. B, pp. 37-38)

The Commission is the guardian of the Congressional policy against rail intrusion into the motor carrier field. As such, one would expect it to be ever alert to repel such intrusion, except under truly "exceptional circumstances" such as those referred to in this Court's opinions cited. Indeed, it should demand no less than a clear and compelling showing by the rail-affiliated applicant and/or its supporting shipper of the utter necessity for breaching the Congressional policy. Here, its action was so derelict as to amount to a complete abdication of its responsibility. At least as long ago as the *White Line* case,[10] the entire Commission made clear where the burden of proof lies in a case such as this:

> In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad. *Where it fails to show* special circumstances negativing any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified. (Emphasis supplied)

Thus the burden was clearly on the rail affiliate here to show any inadequacies in the services of the independent motor carriers. This, as noted, it did not even attempt to do. This should have ended the matter, as the hearing examiner and review board correctly held. Indeed, this showing of inadequacy in existing service in order to justify a grant of new authority is not a *sine qua non* reserved for rail-affiliated applicants only. The same burden is normally imposed on independent motor carriers seeking to institute new operations. In *Hearin-Miller Trans-*

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[10] *Rock Island Motor Transit Co.—Purchase—White Line*, 40 M.C.C. 457, 474 (1946).

porters Ext.—Point Comfort, Tex., 100 M.C.C. 50, 55 (1965), the Commission's division 1 said:

> Applicants have the burden of establishing affirmatively, by substantial and competent evidence, that the present or future public convenience and necessity require their respective proposed operations. *The lack of opposition on the part of existing motor carriers, standing alone, does not create a presumption of need for a proposed new service.* (Emphasis supplied)

It is thus clear that division 1 was, almost contemporaneously, telling the independent motor carrier applicant in the *Hearin-Miller* case [10a] that the mere absence of opposition to its application created no presumption of a need for its proposed service, and telling the rail-affiliated applicant here, which is supposed to have a "special burden" in such cases, that it will infer a need for its services in the absence of protest. Thus, the division's action converts the rail affiliate's special burden into special privilege, contrary to the provisions of the governing statute.

4. If anything, the division's treatment of Transport Company's application does greater violence to Congressional policy than its generosity to Motor Transit. Whereas, in Motor Transit's case, the division required at least *some* showing, albeit too little to justify the authority granted,[11] the New York Central subsidiary was allowed to avoid any evidentiary burden whatever.

[10a] The cited case was decided four months after the case here involved.

[11] In the district court, we contended that Motor Transit failed to meet even the burden of proof imposed on independent motor carriers in application cases. The district court, characterizing this argument as invalid, held that we were, "in effect, arguing that the 27 ordinary motor carriers were improvidently certificated, . . ." and that in making the argument "ATA seems to have been motivated by the fact that Motor Transit is a railroad affiliate." 260 F. Supp. at 389 (fn. 8) (App. A, pp. 27-28). With deference, we would point out that whether the independent motor carriers were

In its first report, the division correctly held untenable Transport Company's contention that it was not required to show "special circumstances" because Oakbrook is within the "Chicago terminal zone" of its railroad parent (92 M.C.C., at 177, App. C, p. 52):

> The fact remains that Motor Transport desires to serve the Oakbrook facility in its capacity as a motor carrier.. As Oakbrook is located beyond the Chicago commercial zone, specific authority is required to provide this service. See *Commercial Zones and Terminal Areas*, 54 M.C.C. 21. To adopt Motor Transport's view that Oakbrook is a rail point because it is in the New York Central's Chicago terminal zone would mean that the railroad could obviate the showing by its motor carrier affiliate of "special circumstances" with respect to additional points or of the need for the latter's service thereat by the simple expedient of publishing a tariff embracing such points.

In its second report, the division came full circle and allowed Transport Company to do precisely what it had previously forbidden—to "obviate the showing . . . of 'special circumstances' with respect to additional points or the need for [Transport Company's] service thereat by the simple expedient of publishing a tariff embracing such points." 99 M.C.C. 100-101 (App. B, pp. 39-40).

This metamorphosis in the division's thinking seems to have resulted from a switch in its opinion of Transport Company's service—from that of a motor carrier, in its first report, to that of, essentially, a railroad,[12] in the

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"improvidently" certificated is water over the dam. The rail-affiliated applicants had the same opportunity as this appellant to protest one or more of the applications before the Commission, but chose to forego the privilege. And we readily admit that our protest of the applications of Motor Transit and Transport Company were, indeed, motivated by the fact that they are rail affiliates.

[12] The division contented itself with holding that "the specific delivery services here proposed by Transport Company may [not] be regarded as wholly separate from its rail parent's line-haul TOFC [trailer-on-flat-car, or "piggyback"] service. 99 M.C.C. 101 (App. B, p. 39)

second report. In so altering its views, and thus allowing the rail subsidiary to avoid entirely any consideration of the Congressional policy otherwise applicable, the division overlooked important applicable statutory provisions.

The New York Central's tracks do not extend from Chicago to Oakbrook. And if Transport Company's rail parent wanted to so extend them, it most assuredly would have to comply with the provisions of Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), requiring a showing of public convenience and necessity. This being so, we submit that, entirely aside from the Congressional policy here involved, the division could not validly, at one and the same time, proclaim Motor Transport's service to be, in effect, a rail service, and yet allow the railroad involved to avoid the obligation of compliance with § 1(18).

5. The division attempted to buttress its erroneous conclusion that Transport Company needed no authority to serve Oakbrook by an equally erroneous assumption that —if its rail parent offered Plan II rather than Plan III TOFC service to Eastman, the rail subsidiary "could serve Oakbrook under the partial exemption provided by 202(c)(2) of the act as [New York] Central's agent without specific authority under part II of the act," citing *Palisano Common Carrier Application*, 30 M.C.C. 591, 593 (1941), as authority. This "iffy" proposition has no record basis. An Eastman witness clearly indicated that the service involved is Plan III TOFC, not Plan II.[13]

In the first place, we do not agree with the Commission that if New York Central offered a Plan II service from Rochester to Chicago, it could lawfully serve Oakbrook as a point within the railroad's Chicago terminal area. Even assuming, *arguendo*, that Oakbrook is properly within the

[13] Francis P. Ryan, Assistant General Traffic Manager—Service, Eastman Kodak Co., Exh. 2, pp. 3-4, of the record before the Commission.

Chicago terminal area of the New York Central and that it offered the described Plan II service, we submit the Commission's conclusion that Transport Company would need no authority to serve Oakbrook would still be in error.

The basis for the Commission's finding that Transport Company needs no authority to serve Oakbrook is its conclusion that there is no material difference between the railroad's Plan II and Plan III service so far as Transport Company is concerned. 99 M.C.C. 100-101 (App. B, pp. 39-40). This conclusion is not only erroneous on its face; it is contrary to Commission decisions. There is a substantial difference between the two services. Under Plan II, the railroad provides its own door-to-door service, moving its own trailers on flatcars under tariffs usually similar to those of motor carriers. The motor carrier segment of the operation moves the traffic at rail rates and this motor carriage is completely under the control of the railroad. In contrast, under Plan III service, the shipper provides its own trailer, and it is responsible for delivery of the loaded trailer to the rail loading ramp and for its movement from the unloading ramp to ultimate destination. All the railroad does is load the trailer onto the flatcar at origin, perform the line-haul service, and unload the trailer from the flatcar at the rail terminal. So far as the rail carrier is concerned, Plan III eliminates pick-up and delivery expenses, acquisition, and maintenance charges for trailers, and empty return mileage. The railroad pays no rental charge for the trailers and no protective service is provided under Plan III rates. *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders*, 322 I.C.C. 301, 311-312 (1964).

Moreover, a recent decision of Division 2, *All Freight In Trailer On Flat Car—Between The East And Chicago & East St. Louis*, 325 I.C.C. 591, 602 (1965), pointed out in detail the "inherent differences" between the Plan II and Plan III services of the rail respondents there in-

volved, including the New York Central, and stated that the "recognition of such inherent differences is implicit in the cited Commission decisions upholding the legality of plan III service." See also: *Movement of Highway Trailers by Rail*, 293 I.C.C. 93 (1954). Not to be overlooked either is that Transport Company sought authority from the Commission to serve Oakbrook in its own right; not as the motor carrier segment of a nonexistent Plan II service of its railroad parent.

In the second place, the *Palisano* case in no way supports the division's assumption. That case—insofar as it has any application here—merely held that the involved motor-carrier operations within the Buffalo area were subject to the exemption of Section 202(c)(2) of the Interstate Commerce Act, 49 U.S.C. § 302(c), when such operations were performed under contract with a railroad to provide pick-up and delivery service for it. It did *not* hold, as is inherent in the division's decision here, that independent motor carriers are to be restricted in providing service within the "terminal area" of any given community, to strict limits specified by the Commission, while railroads are free to expand their "terminal area" operations at will to serve new points such as Oakbrook, and thus gain the considerable advantage inherent in the freedom which the Commission allows them, but denies to their motor carrier competitors. Indeed, this is the most flagrant aspect of the division's favored treatment of Transport Company: its willingness to ignore the specific command of the National Transportation Policy for "fair and impartial regulation of all modes of transportation" and its requirement that "[a]ll of the provisions of this Act shall be administered and enforced with a view to carrying out" the policy. If a railroad, through what amounts to a process of self-government, can enlarge its (or its subsidiary's) area of service 2½ miles beyond the point where independent motor carriers have to stop, why may it not increase its competitive edge in other instances

to five, ten, perhaps fifty miles? According to the Commission and the court below, this is not a real problem; motor carriers, they say, may appeal to the Commission, urging it to hold that the railroad has enlarged its operating authority—to use the district court's language—beyond its "homogeneous" terminal area at the point involved. Perhaps we are ungrateful, but the suggested solution to the grossly unequal treatment of railroads and motor carriers perpetrated here by the division, and approved by the district court, affords us no comfort whatever.

6. As noted, the *Palisano* case offers no support for the discrimination against independent motor carriers inherent in the decision of division 1. Neither do the provisions of § 202(c)[14] of the Interstate Commerce Act. The section merely provides that motor vehicle operations within "terminal areas" shall be exempt from economic regulation by the Commission under Part II of the Interstate Commerce Act, but shall be regulated under the other sections of the Act applicable to the mode of transport, or forwarder, which conducts such motor vehicle operations, or has them performed by an agent. Section 202(c) in no way suggests that railroads should be allowed to determine the extent of their own exemption, while motor carriers should be held strictly to limits prescribed for them by the Commission. In *Commercial Zones And Terminal Areas*, 54 M.C.C. 21 (1952), the Commission, division 5, established general rules prescribing terminal area limits for motor carriers and freight forwarders. In the course of a lengthy opinion, it said:

> The proposal to abandon the contemplated provision of a general rule and leave the definition of their terminal area limits to the initiative of each motor car-

[14] The provisions of subsections (1) and (2) of § 202(c) differ only in that the first applies to motor vehicle operations within terminal areas performed directly by the various modes of transport mentioned, and by freight forwarders, whereas the second applies to such operations when performed on an agency basis for the carriers specified, or forwarders.

> rier or freight forwarder, even if their proposals were subject to suspension and investigation, would not work. Failure to adopt such a rule would almost surely be the signal for such a host of differing individual proposals as to overwhelm our capacity to investigate and would result in intolerable confusion to the disadvantage of both the public and the industry. We are convinced that it is wholly impracticable to leave the definition of terminal area limits to motor-carrier or forwarder initiative. *Id.* at 56-57.

But the same agency is perfectly willing to leave the definition of *railroad* terminal area limits to the initiative of the railroads, subject, as the district court noted, "to investigation and suspension by the Commission." 260 F. Supp. 390 (App. A, p. 30).

In its first report in *Commercial Zones And Terminal Areas*, 46 M.C.C. 665 (1946) the Commission recognized the futility of attempting to specifically describe motor carrier terminal areas for each city and town in the United States, an approach which it had theretofore taken. It acknowledged the "advantages inherent in this piecemeal approach" but rejected it because of the "innumerable proceedings for the determination of the terminal areas of each [motor] carrier at each point served by it. Obviously, such a course would be prohibitively burdensome and wholly impracticable." *Id.*, 670-671. Why the retention of the "piecemeal approach" for railroads is any less burdensome and impracticable, we are at a loss to understand. Generally speaking, the railroads serve the same points throughout the United States as do the motor carriers.

The facts of this case demonstrate very clearly the favoritism displayed by the division to the railroad subsidiary here. All the independent motor carriers seeking to serve Eastman's Oakbrook plant were obligated to seek authority from the Commission, with the attendant ex-

pense and "red tape" involved.[15] But the rail subsidiary, seeking to serve the same shipper at the same location is spared any evidentiary obligation at all, merely because its parent corporation has listed Oakbrook as a point in its Chicago area terminal tariff.[16] Even if rail subsidiaries seeking to enter the motor field stood on the same footing as independent motor carriers—even if they bore no "special burden," when seeking to enter the motor field—the agency action here would still constitute a flagrant violation of the Congressional requirement of fair and impartial regulation of all transport modes set forth in the National Transportation Policy.

The acceptance by the division and the court below of the tariff filed by Transport Company's rail parent as a legal *fait accompli* has no basis in reason or law. In *Chicago, M., St. P & P. R.* v. *Alouette Peat Products*, 253 F. 2d 449, 456 (CCA 9, 1958), the court said:

> A rate which is in fact unreasonable is not made reasonable by the mere act of filing, nor does the mere act of filing make lawful a publication not made in accordance with the provisions of the act. Filing

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[15] To be sure, Transport Company assumed it would require authority and thus followed the same course as the independent motor carriers. But, in view of the windfall it received, it need not have done so.

[16] Even had we sought the "relief" which the Commission and the court below hold out, by attempting to institute a proceeding before the agency to challenge the railroad's publication of Oakbrook as a point within its Chicago "terminal area," what basis is there to believe the agency would have been any less favorably disposed toward the railroad than it has been here? Our petition could have been denied summarily, or, after a long drawn-out hearing, the agency could well have denied the relief sought on the ground that, as noted by the court below, "Oakbrook is only two and one-half miles beyond the Chicago commercial zone." 260 F. Supp. 390 (App. A, p. 29). The Commission recently denied summarily a petition by appellant in Ex Parte No. 242, *Express Co. Terminal Areas*, seeking to have railroad terminal areas prescribed in such a manner as to remove the discrimination which now exists.

does not constitute publication, or cure a defective publication.

A fortiori, the "simple expedient" whereby Transport Company's rail parent included Oakbrook as being within its so-called Chicago terminal area should not have received the blessing of the agency and court below, where "the mere act of filing" does violence to Congressional policy and the governing decisions of this Court.

It will, no doubt, be urged by appellees that the Commission has prescribed motor-carrier terminal area limits for many years, while, at the same time allowing railroads to exercise their initiative in prescribing their own terminal area limits. But discrimination long practiced is no less discrimination, or, as this Court has put it, "even consistent error is still error." *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672, 678, fn.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, this Court should note probable jurisdiction, reverse the decision of the court below, and remand the case to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 9th day of February, 1967, I served copies of the foregoing document on the several parties herein, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with postage prepaid, to Honorable Thurgood Marshall, Solicitor General, Honorable Donald F. Turner, Assistant Attorney General, Howard E. Shapiro, Esq., and Jerry Z. Pruzansky, Esq., Department of Justice, Washington, D. C. 20530; and David G. Bress, United States Attorney for the District of Columbia, Washington, D. C.;

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Leonard S. Goodman, Esq., Assistant General Counsel, at the offices of the Commission, Washington, D. C. 20423;

3. On New York Central Transport Co., intervening defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its counsel, Herbert Burstein, Esq., 160 Broadway, New York, N. Y., and Joseph Rotwein, Esq., 1500 Massachusetts Ave., N. W., Washington, D. C.;

4. On Rock Island Motor Transit Company, intervening defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its counsel, Martin L. Cassell, Esq., and Thomas J. Megan, Esq., 139 W. Van Buren Street, Chicago, Illinois; and Walter J. Myskowski, Esq., 712 Ring Building, 1200 18th Street, N. W., Washington, D. C.

PETER T. BEARDSLEY

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 835-64

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

ROCK ISLAND MOTOR TRANSIT COMPANY,
NEW YORK CENTRAL TRANSPORT COMPANY,
Intervenors,

* * * *

Before WILBUR K. MILLER, Senior Circuit Judge, KEECH, District Judge, and MATTHEWS, District Judge.

WILBUR K. MILLER, Senior Circuit Judge: Several years ago Eastman Kodak Company decided to move its midwestern sales and distribution facilities from Chicago to a new plant it planned to erect at Oakbrook, Illinois, about two and one-half miles west of the Chicago commercial zone. Desiring to retain the services of the trucking companies which had served its Chicago facilities, Eastman requested the 30 companies involved to apply to the Interstate Commerce Commission for authority to serve the Oakbrook installation. All did so—28 independent trucking companies and two companies wholly owned by railroads.[1] No applicant opposed the applica-

[1] Rock Island Motor Transit, a subsidiary of the Chicago, Rock Island & Pacific Railroad Company, and New York Central Transport, a subsidiary of the New York Central Railroad Company.

tion of any other, but the plaintiff, American Trucking Associations, Inc., opposed the applications of the railroad affiliates, and was the only real protestant. At a consolidated hearing before a trial examiner in 1961, Eastman produced witnesses who testified in support of all 30 applicants. The plaintiff presented no evidence.

Twenty-seven of the 28 independent applicants were certificated by the Commission. On June 25, 1965, after prolonged proceedings upon which we think it unnecessary to elaborate, a division of the Interstate Commerce Commission issued a certificate of convenience and necessity authorizing Motor Transit to serve the Oakbrook installation, and held that Transport already had the authority it sought, by virtue of the fact that Oakbrook, though not a rail point, is described in a New York Central tariff as being within the Chicago terminal area of that railroad.

Thereupon the American Trucking Associations, Inc., by amending its complaint theretofore filed, asked the Court to annul, set aside and permanently suspend and enjoin the reports and orders of the Interstate Commerce Commission which certificated Motor Transit and held Transport already had the authority it sought.[2] The two railroad-owned motor carriers were permitted to intervene.

At the outset it should be noted that judicial review of these orders is extremely limited. The Supreme Court has said that

> ". . . the [Federal Power] Commission's order does not become suspect by reason of the fact that

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[2] That the plaintiff lacked standing to bring this suit was persuasively argued by the Commission. If the question were open, we should be inclined to hold that ATA lacked standing; but the Supreme Court has ruled otherwise. *American Trucking Assns. v. United States*, 355 U.S. 141, 144 (1957).

> it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. . . .[3]

This excerpt from the *Hope* opinion was repeated in *Interstate Commerce Comm'n* v. *City of Jersey City*, 322 U.S. 503, 512-13 (1944). The *Jersey City* opinion also quoted the following from the *Rochester Telephone* case:[4]

> ". . . So long as there is warrant in the record for the judgment of the expert body, it must stand . . . 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' . . ."

Accordingly, our function is to ascertain whether the Commission has correctly applied the law and, if so, whether its findings sufficiently indicate the bases for the conclusions reached, and whether the evidence contains substantial support for the findings. Those are the limits of our power of review.

Rock Island Motor Transit Company. Prior to this proceeding, Motor Transit was operating an unrestricted service authorized by the Commission from Chicago to many points in the Midwest and was moving Eastman's shipments from the latter's Chicago facility to the numerous places to which it made deliveries. It sought authority to serve the new Oakbrook plant as an off-route point in connection with its regular-route operations to and from Chicago, already authorized.

The basic statutory authority of the Interstate Commerce Commission to grant certificates of public conven-

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[3] Federal Power Comm'n v. Hope Natural Gas Co., 320 U. S. 591, 602 (1944).

[4] Rochester Telephone Corp. v. United States, 307 U. S. 125, 145-46 (1939).

ience and necessity to motor carriers is found in § 207 (a)[5] of the Interstate Commerce Act, 49 U.S.C. § 307 (a), 49 Stat. 551. Section 5(2) (b)[6] of the Act, 49 U.S.C. § 5(2) (b), 54 Stat. 906, having to do with acquisitions and mergers, imposes restrictions on the grant of authority to a motor carrier which is controlled by or affiliated with a railroad. The Commission has interpreted this statute as confining acquisition of a motor carrier by a railroad or its affiliate to "operations . . . which are auxiliary or supplementary to train service."[7]

In *American Trucking Assns.* v. *United States*, 355 U.S. 141 (1957), the Supreme Court pointed out that § 207(a) does not contain the restrictive language of

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[5] "Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirement, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied . . . ."

[6] "Sec. 5(2)(b) ". . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

[7] American Trucking Assns. v. United States, 355 U. S. 141, 148 and footnote 8 on p. 148 (1957).

§ 5(2)(b) and that there is no language in § 207(a) "even suggesting a mandatory limitation to service which is auxiliary or supplementary." Later in the opinion the Court said, at pages 149-50:

> "In interpreting § 207, the Commission has accepted the policy of § 5(2)(b) as a guiding light, not as a rigid limitation. While it has applied auxiliary and supplementary restrictions in many § 207 proceedings, the Commission has occasionally issued certificates to railroad subsidiaries without the restrictions where 'special circumstances' prevail, namely, where unrestricted operations by the rail-owned carrier are found on specific facts and circumstances to be in the public interest. . . .
>
> "We conclude, therefore, that the Congress did not intend the rigid requirement of § 5(2)(b) to be considered as a limitation on certificates issued under § 207."

Thus the Commission had authority to grant Motor Transit's application to serve the Oakbrook plant regardless of § 5(2)(b) if it correctly found "special circumstances" negating any possible disadvantage to the public from the grant to a railroad-owned carrier. The plaintiff contends there were no "special circumstances" shown and that, therefore, the certification of Motor Transit was erroneous. Whether so or not is the question with respect to that company.[8]

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[8] The ATA, seriously and at considerable length, also argues that "Motor Transit failed even to meet the burden of proof required of ordinary motor carriers." We are not impressed by that contention because we note that the application of Motor Transit was consolidated with those of 28 ordinary motor carriers as well as with that of New York Central Transport, and that the 30 applications were heard together.

Evidence in support of the 30 applications was presented only by Eastman and was the same in all instances. Thus, the application of Motor Transit was supported by the same proof pursuant to which 27 ordinary motor carriers were certificated. Yet ATA did not attack the certificates of the latter as having been granted on

In discussing the special circumstances question, the Commission said:

> ". . . Motor Transit has been serving Eastman's Chicago plant and is merely seeking to continue to provide Eastman with the same service to the same points from the new facilities at Oakbrook. It is not seeking to provide a new service in the terms discussed in the *Pennsylvania* case [*Pennsylvania Truck Lines, Inc.* v. *United States*, 219 F. Supp. 871 (W.D. Pa. 1963)] nor will its proposed service inject a new quantum of competition detrimental to those independent motor carriers which also have been serving Eastman's Chicago plant and which do not oppose the issuance of authority to Motor Transit. In this connection, it is of real significance in a proceeding such as this that the application is not opposed by competing motor carriers but only by ATA which presented no evidence as to the services which competitive motor carriers are ready, willing, and able to provide. . . . And we may not infer injury to competing carriers in the absence of evidence indicating that present transportation facilities can and are willing to meet the shipper's need for service.
>
> "Thus, the facts of the matter are that: (1) Eastman has indicated a need for a continuation of the service of Motor Transit from Oakbrook to the points Motor Transit has served from Chicago, (2) no motor carrier holding competitive authority opposes the application and there is no indication that any motor carrier is able or willing to serve those points which Motor Transit is authorized to serve and has been serving in the past, and (3) a denial of the

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insufficient proof. So, in arguing that "Motor Transit failed even to meet the burden of proof required of ordinary motor carriers," the ATA is, in effect, arguing that the 27 ordinary motor carriers were improvidently certificated, although it did not oppose them. In making the invalid argument under discussion, ATA seems to have been motivated by the fact that Motor Transit is a railroad affiliate.

> application would clearly deprive the shipper of a transportation service which it has enjoyed in the past and which it needs in order to utilize effectively and economically its new Oakbrook facility. . . ."

The Commission also pointed out that Motor Transit's existing authority is free of the usual restrictions imposed on motor carrier operating rights issued to rail affiliates and that "the instant application is but a slight extension" of the authority. We hold that the Commission correctly concluded that special circumstances exist which amply justified the grant of Motor Transit's application.

New York Central Transport Company. This motor carrier sought a certificate to serve Eastman's Oakbrook plant from Chicago, although that operation would be subsequent to a rail movement to Chicago from the shipper's Rochester facilities. The Commission held that such a certificate was unnecessary as New York Central Transport already had, under its rail parent's authority, the right to make deliveries from Chicago to Oakbrook because Oakbrook, though not a rail point, is properly described in a tariff of the New York Central Railroad as being within the railroad company's Chicago terminal area.

Distilled to its essence, ATA's position seems to be that Oakbrook is not properly described as being within New York Central's Chicago terminal area. We have noted that Oakbrook is only two and one-half miles beyond the Chicago commercial zone, and we think it apparent, therefore, that Oakbrook, being described in a New York Central tariff, is within that railroad's homogeneous terminal area at Chicago.

ATA argues that if a railroad can extend its terminal area two and one-half miles beyond the commercial zone of its terminal city by the simple expedient of publishing a tariff for that point, it could by the same expedient extend its terminal area somewhat indefinitely. The ar-

gument is invalid because any terminal area description is subject to investigation and suspension by the Commission and may be attacked by the complaint of any interested party. Long ago, in *Palisano Common Carrier Application*, 41 M.C.C. 229, 232 (1942), the Commission said:

> "Terminal areas must, of course, be limited to areas in which the motor-vehicle transportation consists of genuine transfer, collection, or delivery service as distinguished from line-haul transportation. Where the terminal areas of the rail carriers, motor carriers, express companies, water carriers, and freight forwarders extend beyond the corporate limits of a village, town, or city, such 'terminal areas' should be defined in their tariffs. Such descriptions of terminal areas are subject to suspension and investigation by this Commission and may be attacked upon complaint of any interested party."

There is no authoritative definition of a terminal area. It is necessary that any question concerning the propriety of any such area be determined upon the facts of the particular case presented.

We are clearly of the opinion that Oakbrook was properly held by the Commission to be within New York Central's Chicago terminal area. We hold therefore that the Commission was correct in concluding that Transport did not need a certificate for its operations between Chicago and Oakbrook.

Affirmed.

* * * *

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-67916 (Sub-No. 20)[1]

NEW YORK CENTRAL TRANSPORT COMPANY EXTENSION—OAKBROOK, ILL.

Decided June 25, 1965

* * * *

REPORT OF THE COMMISSION ON FURTHER CONSIDERATION

DIVISION 1, COMMISSIONERS MURPHY, BUSH, AND BROWN

BUSH, *Vice Chairman:*

In these two applications, the specifications of which are set forth in the appendix to this report, New York Central Transport Company (Transport Company) and The Rock Island Motor Transit Company (Motor Transit), wholly owned motor carrier subsidiaries of the New York Central Railroad Company (Central) and the Chicago, Rock Island and Pacific Railroad Company (Rock Island), respectively, seek certificates that would generally authorize them to serve the site of the Eastern [sic] Kodak Company, at Oakbrook, Ill., in the movement of general commodities.[2] These proceedings have been reopened in order to examine whether applicants, as motor carrier affiliates of railroads, require additional authority under part II of the Interstate Commerce Act to perform the operations they propose; and, if so, whether they have met their burden of proving that so-called special cir-

[1] This report also embraces No. MC-29130 (Sub-No. 92), The Rock Island Motor Transit Company Extension—Oakbrook, Ill.

[2] A certificate authorizing the operations sought, subject to certain restrictions, was issued to Motor Transit on April 8, 1964. No certificate has been issued to Transport Company.

cumstances exist which warrant the relaxation of the general policy against granting functionally unrestricted (neither auxiliary to nor supplementary of rail movements) motor carrier authority to railroad affiliates.

Both applications were opposed by American Trucking Associations, Inc., and Consolidated Freightways Corporation of Delaware (and an affiliate of the latter, New York Consolidated Freightways Corporation), hereinafter called ATA and Consolidated, respectively. Consolidated stated in a telegram addressed to the Commission, dated April 23, 1962, that its opposition to the granting of the authority sought by Transport Company would be withdrawn upon amendment of the latter's application so as to restrict service to the handling of traffic which has had a prior, or will have a subsequent, rail movement. Such an amendment has been made.

HISTORY OF THE PROCEEDINGS

The Operating Rights Review Board affirmed the examiner's recommended denial of the applications, 91 M.C.C. 161 (decided August 10, 1962). The board concluded, *inter alia, (a)* that both applicants required appropriate motor carrier authority to perform the proposed operations, but *(b)* that they had failed to demonstrate that "special circumstances" exist which would warrant a grant to them of functionally unrestricted authority. Upon consideration of the record, petitions by applicants, and a reply by ATA, former division 1 reopened the proceedings for reconsideration on the present record by order of February 13, 1963. In the prior report on reconsideration, 92 M.C.C. 173 (decided June 17, 1963), while affirming the board's conclusions that both applicants require motor carrier authority, "special circumstances" were found to exist and the applications were granted. ATA thereupon filed suit in the United States District Court for the District of Columbia (American Trucking Association, Inc. *v.* United States, civil action No. 835-

64), but upon consideration of the record, division 1, by order of June 23, 1964, reopened the proceedings for further consideration.

STATEMENT OF FACTS

Eastman, at the time of the hearing (1961), was in the process of building a plant at Oakbrook—a point about 2.5 miles outside of the Chicago commercial zone but within Central's rail terminal area.[3] Both applicants have served Eastman's Chicago plant (located in the Chicago commercial zone): Transport Company as a carrier of inbound freight on traffic originating at Eastman's Rochester plant and Motor Transit as a distribution carrier on outbound traffic moving from Eastman's Chicago plant to points in an area Motor Transit serves under certain functionally unrestricted motor carrier authority. They both desire to continue to serve Eastman at its new facilities at Oakbrook in the same manner that they have been serving it at Chicago. As a result of a hearing on a consolidated record with the instant application proceedings, (No. MC-82 (Sub-No. 11), *Best Way of Indiana, Inc., Extension—Oakbrook, Ill.* (not printed), decided October 9, 1961), 27 independent motor carriers were authorized to serve Eastman's Oakbrook plant. Interstate Motor Freight System and Schrieber Trucking Co., Inc., provide Eastman with an inbound service similar to that proposed by Transport Company from Rochester and 23 carriers provide Eastman with an outbound service similar to that proposed by Motor Transit.

Prior to 1946, Eastman had used rail boxcar service between Rochester and Chicago, but Interstate and Schrie-

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[3] The terminal area of a railroad at a point embraces all points in an area within which it performs bona fide collection, delivery, or transfer service. If the terminal area of a railroad embraces points beyond a municipality, it must be specifically described in appropriate tariffs of the railroad. Oakbrook is described as such a point in one of Central's tariffs (discussed *infra*).

ber have been serving it since 1946 and 1957, respectively. In 1959 Central established plan III, trailer-on-flatcar (TOFC),[4] rates and Eastman diverted substantial portions of its traffic moving from Rochester to Chicago from all-motor movement to the rail-motor plan III TOFC service. These shipments are handled as follows: (1) a Flexi-Van, which is the name given by Transport Company to the trailers it owns and uses in its integrated rail-motor services, is leased by Transport Company to Eastman at Rochester, (2) Transport Company provides a local pickup service for Eastman for the movement of the leased trailer to the rail ramp (both Eastman's Rochester plant and the rail ramp are within the Rochester commercial zone), (3) the Flexi-Van is then transported by Central by rail to the rail ramp in Chicago, and (4) Transport Company's Flexi-Van, which is still under lease to Eastman, is then transported by Transport Company for Eastman to Eastman's plant at Chicago (or, under the present proposal, Oakbrook). (Although Transport Company avers that it also participates in a plan II[5] TOFC service wherein Central would lease Transport Company's Flexi-Van equipment and hire Transport Company for the motor portion of the movement, the shipper indicates that only plan III service has been utilized.

DISCUSSION AND CONCLUSIONS

Whether applicants, as rail-carrier affiliates, should be granted authority to serve Eastman's Oakbrook plant depends initially upon whether any specific authority under

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[4] Plan III: Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroads.

[5] Plan II: Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

part II of the act is needed by them to perform the proposed services, and secondly, upon whether "special circumstances" warrant the issuance to them of functionally unrestricted motor carrier operating authority. The first question arises because Oakbrook is a point within the rail terminal area of Central, as provided for by its plan II tariff; and because section 202(c)(2) of the Interstate Commerce Act exempts from the certificate and permit requirements of part II of the act, motor transportation conducted—

> by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I * * * in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, * * * as part of, and shall be regulated in the same manner as, the transportation by railroad, * * * to which such services are incidental.

The second question results from the long-established policy, articulated expressly in section 5(2)(b) of the act and generally in the national transportation policy, against railroad incursions into the field of independent motor carrier service. *American Trucking Assns., Inc.*, v. *United States*, 364 U.S. 1 (1960). Because of the differing and particular circumstances surrounding each of the present applications, these issues must be considered separately as they relate to each applicant.

MOTOR TRANSIT

The service proposed by Motor Transit, notwithstanding that it is an affiliate of a rail carrier (Rock Island) or that Oakbrook is within Central's terminal area, will not be performed as an incident of rail service. Motor Transit proposes to serve Oakbrook as an off-route point in connection with its presently authorized regular-route motor carrier service extending from Chicago to a large

number of described points in the Midwest, and all movements handled by it from or to Oakbrook would presumably have either a prior or subsequent line-haul movement by motor vehicle. A motor carrier, regardless of its affiliation with a carrier by railroad, is subject to the requirements of part II of the act (see *New York Central Transport Co.—Modification*, 89 M.C.C. 389). And inasmuch as the service to be performed by Motor Transit at Oakbrook is "incidental" to a line-haul motor movement, it follows that motor carrier authority is necessary if the point to be served is outside the motor carrier terminal area of that point. The sixth supplemental report in *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, in effect determines that a motor carrier's terminal area at a municipality is coextensive with the commercial zone of that municipality (49 CFR 170.45). Oakbrook is outside the commercial zone of Chicago (49 CFR 170.2) and is thus also beyond that area which Motor Transit can serve under the partial exemption of section 202(c)(2) of the act as an incident of its line-haul motor movement. We conclude that Motor Transit needs certificated authority under part II of the act to serve Oakbrook in the manner proposed.

The requirements of section 5(2)(b) of the act, as they are applied to rail affiliates seeking motor carrier authority under section 207 of the act, in effect, proscribe grants of functionally unrestricted authority to such carriers except in those instances where it may be determined that "special circumstances" prevail which negate any possible disadvantage to the public that may result from the grant to a rail-owned motor carrier of such unrestricted rights. In making this determination, each proceeding must be decided upon its own factual situation. Cf. *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457; *Union Pac. Motor Freight Co.—Key Point Restrictions*, 74 M.C.C. 279; and *Rock Island Motor Transit Co. Com. Car. Application*, 63

M.C.C. 91, affirmed, *American Trucking Assns., Inc.*, v. *United States*, 355 U.S. 141. Our analysis of the record in the subtitled proceeding convinces us that Motor Transit has established the existence of "special circumstances" warranting the grant to it of the independent motor carrier authority it seeks.

In *Pennsylvania Truck Lines, Inc., Extension—Cement*, 91 M.C.C. 167, affirmed *sub nom., Pennsylvania Truck Lines, Inc.*, v. *United States*, 219 F. Supp. 871 (W.D. Pa. 1963), numerous motor carriers vigorously opposed the rail carrier affiliates' proposals to provide a new motor carrier service not theretofore offered by them. The Commission found, on the facts in that proceeding, that the independent motor carriers opposing any grants of authority to the rail-affiliated applicants were authorized and willing to meet the reasonable transportation requirements of the eastern cement producers, and that the denial of certain applications of the railroad motor affiliates would not deprive the cement industry of a needed transportation service. Such is not the case here. Motor Transit has been serving Eastman's Chicago plant and is merely seeking to continue to provide Eastman with the same service to the same points from the new facilities at Oakbrook. It is not seeking to provide a new service in the terms discussed in the *Pennsylvania* case nor will its proposed service inject a new quantum of competition detrimental to those independent motor carriers which also have been serving Eastman's Chicago plant and which do not oppose the issuance of authority to Motor Transit. In this connection, it is of real significance in a proceeding such as this that the application is not opposed by competing motor carriers but only by ATA which presented no evidence as to the services which competitive motor carriers are ready, willing, and able to provide. Cf. *Burlington Truck Lines, Inc.—Purchase—Pirnie*, 85 M.C.C. 363, 372-373; and *Burlington Truck Lines, Inc., Extension—Lemont, Ill.*, 94 M.C.C. 195. And

we may not infer injury to competing carriers in the absence of evidence indicating that present transportation facilities can and are willing to meet the shipper's need for service.

Thus, the facts of the matter are that: (1) Eastman has indicated a need for a continuation of the service of Motor Transit from Oakbrook to the points Motor Transit has served from Chicago, (2) no motor carrier holding competitive authority opposes the application and there is no indication that any motor carrier is able or willing to serve those points which Motor Transit is authorized to serve and has been serving in the past, and (3) a denial of the application would clearly deprive the shipper of a transportation service which it has enjoyed in the past and which it needs in order to utilize effectively and economically its new Oakbrook facility. We recognize that certain independent motor carriers granted authority in the related proceeding in the *Best Way* case, *supra*, may well be able to serve some of the points Motor Transit can serve, and their existence is a factor to be considered in determining whether there are present, on this record, "special circumstances" supporting a grant of authority to Motor Transit. Their existence, however, without further evidence of their willingness and ability to serve Eastman in the manner proposed by Motor Transit clearly cannot be said to warrant a denial of this application. We, therefore, affirm the findings in the prior report that Motor Transit should be granted the authority sought by it in the subtitled proceeding. In arriving at this conclusion we are further motivated by a realization that in this geographical area applicant's existing authority, of which the instant application is but a slight extension and with which any authority granted in this proceeding will be combined or tacked to provide the service needed, is free of the usual restrictions imposed on motor carrier operating rights issued rail affiliates. Cf. *Rock Island Motor Transit Co. Ext.—U. S. Highway 69*, 88 M.C.C. 491.

TRANSPORT COMPANY

Transport Company, unlike Motor Transit, proposes to serve Eastman's Oakbrook plant from Chicago, subsequent to a rail movement to Chicago from that shipper's Rochester facilities; and it seeks a motor carrier certificate despite its admitted ability to perform the same physical operation "for" Central as an incident of Central's Rochester-Chicago rail service. Thus, if Central held itself out to Eastman to provide a complete service on the movement of traffic from Rochester to Oakbrook, as it assertedly offers under its plan II TOFC tariff, Transport Company could serve Oakbrook under the partial exemption provided by section 202(c)(2) of the act as Central's agent without specific authority under part II of the act. See *Palisamo Common Carrier Application*, 30 M.C.C. 591, 593 (1941). It is equally plain that Transport Company would require appropriate motor carrier authority in order to provide the Chicago-Oakbrook service in its own right unrelated to its parent's rail service and subject to its own motor carrier tariffs; for, no carrier may provide, or publish tariffs covering, an unauthorized for-hire motor service not otherwise exempt from the certificate and permit requirements of the act. But the questions remain as to whether the specific delivery services here proposed by Transport Company may, indeed, be regarded as wholly separate from its rail parent's line-haul TOFC service and whether, even if they could be so regarded, such services should be specifically authorized in the circumstances here present. We think that these questions, on the particular record before us, must be answered in the negative.

What is offered under plan II TOFC by Central is a door-to-door, motor-rail-motor, Flexi-Van service, and what is proposed here under plan III is the same integrated service, albeit under the guise that Transport Company would act independently of its rail parent, Central, in offering the shipper a different service than is

today held out by Central alone. This, however, is a difference in form, not in substance. The plan III TOFC service which Transport Company and Central together offer the shipping public is unique when compared with the TOFC services proffered by most other rail carriers: Flexi-Vans are not leased to other motor carriers by Transport Company and Central does not (because it is not so equipped) handle any trailers other than Flexi-Vans. Thus, Eastman has no choice other than to use Transport Company to transport a Flexi-Van to Central's ramp in Rochester and to again use Transport Company to transport the Flexi-Van from Central's ramp at Chicago to the plant in Oakbrook. The services provided by these affiliated carriers under plans II and III, in the peculiar circumstances presented, plainly are inseparable, although there would be only one rate under plan II and at least two individual rates under plan III.

We have often held that a carrier which can perform a transportation service under existing laws or regulations should not be issued additional authority. Compare *Sheridan-Indianapolis Bus Line, Inc., Ext.—Sheridan*, 91 M.C.C. 193, 92 M.C.C. 285. This is true whether the proposed operation can be conducted by virtue of specific operating authority held by the carrier or because the proposed operation is partially exempt from regulation by the Commission. Cf. *Werner Common Carrier Application*, 95 M.C.C. 387. And it is equally true that operating authority should not be issued to enable a carrier to make subject to direct economic regulation by this Commission a transportation service that otherwise would be exempt from such regulation. Accordingly, we do not believe, in the circumstances here before us, that sound regulatory policy would be served by a grant to Transport Company of unneeded motor carrier operating authority that would only enable it to perform a transportation service identical to that which it can presently perform in conjunction with its parent railroad, albeit under

a different form or style of rates. We conclude that the application of Transport Company in the title proceeding must be denied.

One further matter requires consideration. The ATA asserts that certain motor carriers do not oppose the present applications because of undisclosed pressures brought upon them by either applicants or their supporting shipper. The ATA itself does not support its allegations with any facts, and our review of the record indicates nothing which in any way lends credence to ATA's assertion. Eastman supported the applications of those carriers which had been serving it at its Chicago plant, and, except for Consolidated (which withdrew its opposition to Transport Company's application upon the offering by Transport Company of a restrictive amendment which protected Consolidated's interest), the remaining protestants withdrew their opposition upon either the amendment of the applications or Eastman's agreeing at the hearing to support their proposed applications to serve Oakbrook. Consolidated has not participated in the Motor Transit proceeding subsequent to the hearing and, so far as we can determine from the present record, holds no authority to provide service competitive with that offered by Motor Transit. We find, in these circumstances, no merit to the unsubstantiated arguments of ATA.

FINDINGS

In No. MC-67916 (Sub-No. 20), on further consideration, we find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation, and that the application should be denied.

In No. MC-29130 (Sub-No. 92), on further consideration, we find that the present and future public convenience and necessity require operation by applicant, in

interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, household goods as defined by the Commission, and those requiring special equipment, serving the plant site of the Eastman Kodak Company at Oakbrook, Ill., as an off-route point in connection with presently authorized regular-route operations between Chicago and Silvis, Ill., restricted against the handling of traffic originating at, or destined to, points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties; and that applicant is fit, willing, and able properly to perform the proposed service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. Since the certificate has already been issued to Motor Transport, no further findings are required in this proceeding.

An appropriate order will be entered.

COMMISSIONER MURPHY, dissenting in part:

I am unable to agree with the majority's finding that Motor Transit has established the existence of "special circumstances" warranting the grant to it of the unrestricted motor carrier authority it seeks. The test for determining "special circumstances" has been clearly defined by the courts and the Commission. In *Pennsylvania Truck Lines, Inc.*, v. *United States*, 219 F. Supp. 871 (W.D.Pa. 1963) the court stated: "The only 'special circumstances' which have led the Commission to relax its restrictions on motor service by rail subsidiaries have been the unavailability of independent motor carrier service for the area involved." See also *American Trucking Assns., Inc.*, v. *United States*, 364 U.S. 1 (1960) and cases discussed therein.

Although no representations were made by the 27 motor carriers recently granted authority [in No. MC-82 (Sub-

No. 11), *Best Way of Indiana, Inc., Extension—Oakbrook, Ill.*] to serve Eastman's Oakbrook plant, it is illogical to assume that a number of these carriers would be unable or unwilling to provide Eastman with the type of service proposed by Motor Transit.

APPENDIX

Authority sought

In No. MC-67916 (Sub-No. 20), by application filed June 20, 1961, as amended, the New York Central Transport Company, a wholly owned subsidiary of the New York Central Railroad Company, of New York, N. Y., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities between Chicago, Ill., and the plant site of the Eastman Kodak Company at Oakbrook, Ill.; restricted: (1) against the handling of traffic originating at, or destined to, points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties, and (2) against the handling of traffic which has not had a prior, or will not have a subsequent, rail movement.

In No. MC-29130 (Sub-No. 92), by application filed June 23, 1961, as amended, The Rock Island Motor Transit Company, a wholly owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, of Des Moines, Iowa, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, household goods as defined by the Commission, and those requiring special equipment, serving the site of the Eastman plant at Oakbrook, as an off-route point in connection with presently authorized regular-route operations to and from Chicago, restricted against the handling of

traffic originating at, or destined to, points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 25th day of June A.D. 1965.

No. MC-67916 (Sub-No. 20)

NEW YORK CENTRAL TRANSPORT COMPANY
EXTENSION—OAKBROOK, ILL.

No. MC-29130 (Sub-No. 92)

THE ROCK ISLAND MOTOR TRANSIT COMPANY
EXTENSION—OAKBROOK, ILL.

It appearing, That on August 10, 1962, the Commission, Operating Rights Review Board, made and filed its consolidated report (91 M.C.C. 161) and order in the above-entitled proceedings, denying the applications;

It further appearing, That upon consideration of the record, of petitions by applicants, and the reply of The American Trucking Associations, Inc., the Commission, division 1, by order dated February 13, 1963, reopened the proceedings for reconsideration on the present record;

It further appearing, That on June 17, 1963, the Commission, division 1, made and filed its consolidated report (92 M.C.C. 173) and order in the above-entitled proceedings, granting the applications;

It further appearing, That upon further consideration of the record, on June 23, 1964, the Commission, division 1, reopened the proceedings on its own motion for further consideration;

And it further appearing, That further consideration of the matters and things involved in these proceedings has been given and that the said division on the date hereof has made and filed its consolidated report on further consideration herein, containing its findings of fact and conclusions thereon, which report and the said reports of August 10, 1962, and June 17, 1963, are hereby referred to and made a part hereof;

It is ordered, That the said order of June 17, 1963, to the extent that it applies to No. MC-67916 (Sub-No. 20), be and it is hereby, vacated and set aside.

It is further ordered, That the said applications, except to the extent granted in the said report on further consideration, be, and they are hereby, denied.

By the Commission, division 1.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-67916 (Sub-No. 20)[1]

NEW YORK CENTRAL TRANSPORT COMPANY EXTENSION—OAKBROOK, ILL.

Decided June 17, 1963

* * * *

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 1, COMMISSIONERS HUTCHINSON, WEBB, AND HERRING

HERRING, *Commissioner:*

In No. MC-67916 (Sub-No. 20), by application filed June 20, 1961, as amended, the New York Central Transport Company, a wholly owned subsidiary of The New York Central Railroad Company, of New York, N. Y., hereinafter called Transport Company and the New York Central, respectively, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities between Chicago, Ill., and the plant site of the Eastman Kodak Company at Oakbrook, Ill.; restricted (1) against the handling of traffic originating at, or destined to, points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties, and (2) against the handling of traffic which has not had a prior, or will not have a subsequent, rail movement.

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[1] This report also embraces No. MC-29130 (Sub-No. 92), The Rock Island Motor Transit Company Extension—Oakbrook, Ill.

In No. MC-29130 (Sub-No. 92), by application filed June 23, 1961, as amended, The Rock Island Motor Transit Company, a wholly owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, of Des Moines, Iowa, hereinafter called Motor Transit, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, household goods as defined by the Commission, and those requiring special equipment, serving the site of the Eastman Kodak Company plant at Oakbrook, Ill., as an off-route point in connection with presently authorized regular-route operations to and from Chicago, restricted against the handling of traffic originating at, or destined to points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties.

Both applications were opposed by American Trucking Associations, Inc., and Consolidated Freightways Corporation, of Delaware and an affiliate of the latter, New York Consolidated Freightways Corporation, hereinafter called ATA and Consolidated, respectively. Consolidated stated in a telegram addressed to the Commission, dated April 23, 1962, that its opposition to the granting of the authority sought by Transport Company would be withdrawn upon amendment of the latter's application so as to restrict service against the handling of traffic which has not had a prior, or will not have a subsequent rail movement. Such an amendment was made.

The examiner recommended that the applications be denied, and in the prior report herein, 91 M.C.C. 161, decided August 10, 1962, the Operating Rights Review Board also denied the applications. Thereafter, upon consideration of the record, of petitions of applicants, and of a reply thereto by ATA, the proceedings were reopened for reconsideration on the present record by our order of February 13, 1963.

In its petition Transport Company contends (1) that it should not be required to show that "special circumstances" require the proposed service as Oakbrook is within the New York Central's Chicago terminal zone, and, therefore, is a rail point, (2) that whether Oakbrook is a rail point can only be determined by reference to the New York Central's terminal zone—not the Chicago commercial zone, as defined by the Commission, (3) that the fact that Oakbrook is in the New York Central's terminal zone constitutes "special circumstances," (4) that it can already provide the same service to Eastman under its parent railroad's TOFC plan II[2] service, and merely wishes to participate in providing service in its own name under TOFC plan III,[3] (5) that approximately 50 percent of Eastman's traffic between Rochester and its warehouse in Chicago moves in TOFC service, in flexivan equipment leased from Transport Company, (6) that it proposes to render the same service at the Oakbrook facility that it is now performing at the Chicago warehouse, (7) and that Transport Company has eliminated motor carrier opposition by agreeing to restrict its proposed operations to traffic having a prior or subsequent rail movement.

Motor Transit contends that the board erred (1) in concluding *(a)* that it was necessary for it to prove "special circumstances" in this case without reference to prior applications before the Commission, and *(b)* that the 27 carriers[4] granted authority should be afforded an oppor-

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[2] Plan II: Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

[3] Plan III: Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

[4] These applications by the respective railroad affiliates, together with 28 other applications filed by independent motor carriers, also seeking authority to serve the Eastman plant at Oakbrook, were

tunity to provide service before additional service by this applicant is authorized, and (2) in stating that Motor Transit's application was restricted in the same manner as the application of Transport Company. It argues that it had already established proof of special circumstances in obtaining its present authority to conduct an unrestricted motor carrier operation between Chicago and Silvis, Ill., which lies beyond Eastman's plant at Oakbrook; that it is not necessary to prove special circumstances again; and that the evidence shows that Eastman requires its service as well as that of the 27 motor carriers that have been granted similar authority.

Petitioners request that the board's decision be reversed and that their respective applications be granted. In reply ATA controverts all of the principal contentions of both applicants and maintains that the board's findings and conclusions are correct and should not be disturbed.

The evidence, the petitions, the reply thereto, and the reports of the examiner and of the Review Board have been considered. We find the statements of facts in the examiner's and board's reports to be accurate in all material respects and, as supplemented, we adopt such statements as our own. The facts will be restated herein only to the extent necessary for clarity of discussion.

Transport Company generally operates over routes extending eastward from Chicago and holds certificates which authorize the transportation of general commodi-

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heard by the examiner on a consolidated record. The applications of the 28 independent carriers, which were unopposed, were the subject of a report and recommended order of the examiner, in No. MC-82 (Sub-No. 11), Best Way of Indiana, Inc., Extension—Oakbrook, Ill., wherein it was recommended that each of the respective applications be granted authority to serve the site of Eastman's plant at Oakbrook in connection with presently authorized regular-route operations to and from Chicago. All but one of these applications were subsequently granted, and certificates have been issued therein.

ties in a service auxiliary to that of its parent railroad. It has been an active participant in traffic moving from Eastman's manufacutring plants in Rochester to its warehouse facilities in Chicago. Eastman has utilized its service in the pickup and delivery of its products at Rochester and Chicago in connection with a plan III TOFC service. If the application is granted Motor Transport intends to perform a similar service for Eastman between Rochester and Chicago, except that pickup and delivery would be made at the Oakbrook facility instead of the Chicago warehouse. Actually, it is here seeking authority for a motor movement in the transportation of shipments between the rail ramp in Chicago and the plant in Oakbrook. It is contemplated that Eastman will continue, as in the past to lease flexi-van trailers from Motor Transport and to engage applicant to perform pickup and delivery service in connection with equipment and shipments moving in this manner over the rail lines of the New York Central.

Motor Transit operates generally over routes extending westward from Chicago, and is authorized to transport general commodities with certain exceptions over most of the routes in a service auxiliary to that of its rail affiliate. It also holds unrestricted motor carrier authority over certain routes, including one extending between Silvis, Ill., and Chicago. The highways authorized in this latter operation are located in close proximity to the Oakbrook facility; however, Motor Transit is not authorized to serve intermediate points on that route. Motor Transit has performed extensive service for Eastman in the transportation of less-than-truckload shipments from Chicago and desires to continue providing such a service from the new facility at Oakbrook.

At the time of the hearing Eastman had under construction a large plant at Oakbrook, to which it expected to move from its present location in Chicago in October 1962. Oakbrook is located about 18 miles west of Chicago,

and is about 2½ miles outside the Chicago commercial zone. Upon completion, the plant in Oakbrook will be the distribution center for Eastman's Midwest Sales Division which embraces 17 States. The Chicago warehouse is stocked with a wide variety of photographic materials and equipment from Eastman's manufacturing plants in Rochester. Many of the products are fragile and some of the more sensitive items must be kept under refrigeration. All of these items will be stocked at Oakbrook in the future. In 1960 about 29½ million pounds of the described commodities were moved from the Chicago facility. Nearly all of the independent motor carriers already granted authority to serve Oakbrook had long served the Chicago warehouse. Eastman anticipates a need for additional service at the new plant because of increased production. It requires prompt single-line service from its Oakbrook plant to various key points in the 17-State area. Eastman prefers to use the services of experienced motor carriers that have acquired skill in meeting its transportation needs.

Consolidated is the only motor carrier offering evidence in opposition to the instant applications. This protestant holds extensive authority as a common carrier of general commodities in Eastman's midwest sales territory and can provide direct service between Rochester and Oakbrook. However, it is not shown on the record whether Consolidated has ever transported any traffic for Eastman from Rochester to Chicago.

In general the Commission has endeavored to give effect to the requirements of section 5(2)(b) of the act concerning undue restraint of competition and to carry out the provisions of the national transportation policy with respect to the preservation of the inherent advantages of the different modes of transportation by requiring that any authority granted to a motor carrier affiliate of a railroad be restricted to service auxiliary to or supplemental of rail service. A discussion of this policy is set

forth in some detail in *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457, and will not be repeated. This policy has been relaxed only in those instances where special circumstances existed which require the unrestricted motor carrier service of a rail affiliated motor carrier. See *Union Pac. Motor Freight Co.—Key Point Restrictions*, 74 M.C.C. 279.

We do not agree with Motor Transport's contention that it is not required to show "special circumstances" because Oakbrook is within the Chicago terminal zone of the New York Central. The fact remains that Motor Transport desires to serve the Oakbrook facility in its capacity as a motor carrier. As Oakbrook is located beyond the Chicago commercial zone, specific authority is required to provide this service. See *Commercial Zones and Terminal Areas*, 54 M.C.C. 21. To adopt Motor Transport's view that Oakbrook is a rail point because it is in the New York Central's Chicago terminal zone would mean that the railroad could obviate the showing by its motor carrier affiliate of "special circumstances" with respect to additional points or of the need for the latter's service thereat by the simple expedient of publishing a tariff embracing such points.

Motor Transit argues that it is not required to show "special circumstances" to obtain the authority sought in the instant application because "special circumstances" have already been shown in prior proceedings in the involved area, particularly in connection with the unrestricted grant of authority to it over the route between Silvis and Chicago, which traverses an area located near Eastman's new facility at Oakbrook. We believe this position to be untenable. The application of any motor carrier, whether a rail affiliate or not, must rest upon its own factual situation. This view is in accord with the decision in *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91, wherein the Commission said

"each case of this character must be determined upon the facts and circumstances disclosed by the evidence."

These proceedings involve certain facets of the "follow the traffic" theory. In the usual case, the shipper's factory or other origin plant is moved to a new location. Here, it is one of the shipper's distribution facilities that has been moved. The filing of the instant applications, as well as the related applications, was occasioned by the movement of the distribution center of Eastman's Midwestern Sales Division from Chicago to Oakbrook. In *Smith & Solomon Trucking Co. Extension—Camden, N. J.*, 61 M.C.C. 748, the Commission stated that "a grant of authority on a mere showing of loss of traffic without proof of lack of adequate existing service in the new location would be contrary to law and sound reasoning." Carriers have been allowed to follow the traffic where existing carriers would not be harmed, *Helm's Exp., Inc., Extension—Mahwah, N. J.*, 67 M.C.C. 183, or where there is a need for the service of a particular carrier, *P. Callahan, Inc., Extension—Souderton, Pa.*, 73 M.C.C. 696.

As indicated above, we are of the opinion that these rail affiliated applicants have failed to demonstrate that they should be freed from the burden of showing "special circumstances." Eastman actively supported these applicants as well as all but three of the independent motor carrier applicants because *(a)* all had served the shipper at its Chicago warehouse in a satisfactory manner, and *(b)* it requires a prompt service by carriers skilled in handling its products. The evidence shows that service in addition to that performed by the carriers supported by Eastman was utilized at the Chicago warehouse. Eastman contemplates a need for an expanded service at Oakbrook due to increased production. The public interest is of primary importance, in cases of this nature, and in our opinion the demonstrated specific need of the shipper, Eastman, constitutes "special circumstances" in these

proceedings. Moreover, the dearth of motor carrier opposition to the applications indicates that any harmful effect of approval thereof upon existing carriers would be minimal. All things considered, we conclude that the applications should be granted. Inasmuch as 27 motor carriers have been granted authority to serve the involved plant site and the evidence shows a need for service at that point only, it seems that the authority granted herein should be similarly restricted.

In No. MC-67916 (Sub-No. 20), on reconsideration, we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle over irregular routes, of general commodities, between Chicago, Ill., and the plant site of the Eastman Kodak Company at Oakbrook, Ill.; restricted (1) against the handling of traffic originating at or destined to points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties, and (2) against the handling of traffic which has not had a prior, or will not have a subsequent, rail movement.

In No. MC-29130 (Sub-No. 92), on reconsideration, we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, household goods as defined by the Commission, and those requiring special equipment, serving the plant site of the Eastman Kokak Company at Oakbrook, Ill., as an off-route point in connection with presently authorized regular-route operations between Chicago and Silvis, Ill., restricted against the handling of traffic originating at or destined to points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties.

We further find that each applicant is fit, willing, and able properly to perform the proposed service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; and that appropriate certificates should be granted.

Upon compliance by the respective applicants with the requirements of section 215, 217, and 221(c) of the act and the Commission's rules and regulations thereunder within the time specified in the order entered concurrently herein appropriate certificates will be issued.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 17th day of June A.D. 1963.

No. MC-67916 (Sub-No. 20)

NEW YORK CENTRAL TRANSPORT COMPANY
EXTENSION—OAKBROOK, ILL.

No. MC-29130 (Sub-No. 92)

THE ROCK ISLAND MOTOR TRANSIT COMPANY
EXTENSION—OAKBROOK, ILL.

It appearing, That on August 10, 1962, the Commission, Operating Rights Review Board, made and filed its consolidated report and order in the above entitled proceedings, denying the applications;

It further appearing, That upon consideration of the record, of petitions by applicants, and the reply of The American Trucking Associations, Inc., by order dated February 13, 1963, the proceedings were reopened for

reconsideration on the present record and referred to division 1 for disposition;

And it further appearing, That reconsideration of the matters and things involved in these proceedings has been given and that the said division on the date hereof has made and filed its consolidated report on reconsideration herein, containing its findings of fact and conclusions thereon, which report and the said report of August 10, 1962, are hereby referred to and made a part hereof;

It is ordered, That the said order of August 10, 1962, be, and it is hereby, vacated and set aside;

It is further ordered, That the said applications except to the extent granted in the said report on reconsideration, be, and they are hereby, denied.

And it is further ordered, That unless compliance is made by applicants with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report on reconsideration shall be considered as null and void and the applications shall stand denied in their entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC-67916 (Sub-No. 20)[1]

NEW YORK CENTRAL TRANSPORT COMPANY EXTENSION—OAKBROOK, ILL.

Decided August 10, 1962

* * * *

REPORT OF THE COMMISSION

OPERATING RIGHTS REVIEW BOARD, MEMBERS GAFFNEY, CAVE, AND FREIDSON

BY OPERATING RIGHTS REVIEW BOARD:

Exceptions to the examiner's recommended order were separately filed by both applicants and intervener, Eastman Kodak Company, hereinafter called Kodak. The American Trucking Associations, Inc., hereinafter called American Trucking, protestant, replied.

In No. MC-67916 (Sub-No. 20), by application filed June 20, 1961, as amended, the New York Central Transport Company, a wholly owned subsidiary of the New York Central Railroad Company, of New York, N. Y., hereinafter called Transport Company, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, between Chicago, Ill., and the plant site of the Eastman Kodak Company at Oakbrook, Ill.; restricted (1) against the handling of traffic originating at, or destined to, points

[1] This report also embraces No. MC-29130 (Sub-No. 92), The Rock Island Motor Transit Company Extension—Oakbrook, Ill.

in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties, and (2) against the handling of traffic which has not had a prior, or will not have a subsequent, rail movement.

In No. MC-20130 (Sub-No. 92), by application filed June 23, 1961, as amended, the Rock Island Motor Transit Company, a wholly owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, of Des Moines, Iowa, hereinafter called Motor Transit, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, household goods as defined by the Commission in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, and those requiring special equipment, between Chicago, Ill., and the site of the Eastman Kodak Company plant at Oakbrook, Ill., as an off-route point in connection with presently authorized regular-route operations to and from Chicago, restricted in the same manner as the titled proceeding. American Trucking opposes both applications. Consolidated Freightways Corporation and its affiliate, New York Consolidated Freightways Corporation, hereinafter called Consolidated, withdrew their opposition upon amendment of Transport Company's application in the manner hereinafter described.

The examiner recommended that the applications be denied. On exceptions, Transport Company and intervener collectively assert (1) that Oakbrook, which is located in the Chicago rail terminal zone of Transport Company's parent railroad, is a rail point and Transport Company is not required to show the existence of "special circumstances," (2) that, however, if Oakbrook is not considered to be a rail point for the reason given above, special consideration should be afforded Transport Company since it can already provide the same physical serv-

ice to Kodak under the parent railroad's TOFC plan II [2] service, and merely wishes to provide service in its own right under TOFC plan III,[2] (3) there has been neither a showing of any adverse effect upon competition nor any evidence that any independent motor carrier will provide service, and (4) that the lack of evidence of the availability and willingness of motor carriers to provide this service is sufficient proof of special circumstances. In its exceptions, Motor Transit asserts that it has already proven the existence of special circumstances with respect to the routes under consideration here in prior proceedings, and that there is no need for it again to carry the greater burden of proof just because the shipper has relocated its plant at a point just outside the Chicago commercial zone.

In reply American Trucking asserts (1) that the examiner's report is correct and should be affirmed, (2) that in view of the fact that 28 independent motor carriers were granted authority to serve this same plant, it is incredible that applicants and intervener can argue in good faith that there is no motor carrier service available, and (3) that the burden of proof remains upon applicants at all times to show that a grant of authority to them is not an invasion of the motor carrier field.

The evidence, the examiner's recommendations, the exceptions, and the reply thereto have been considered. The examiner's statement of facts, which we adopt as our own, is amply supported by the evidence, is accurate in all material respects, and is incorporated here by reference. For clarity of discussion, a portion of the examiner's statement of facts is set forth in the appendix hereto.

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[2] Plan II: Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

Plan III: Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

By letter dated April 12, 1962, Transport Company requested that its application be amended so as to restrict the service to the handling of traffic having either a prior or subsequent rail movement. On April 19, 1962, American Trucking filed a motion to strike the letter request by applicant for the reason that *(a)* the letter did not comply with the Commission's General Rules of Practice which requires the formal filing of a motion for leave to amend an application supported by a certification of proper service, and *(b)* such amendment is irrelevant to the disposition of the proceeding. Applicant's reply thereto, filed May 9, 1962, embraced an alternative formal motion to amend the application. Inasmuch as the proposed amendment is restrictive in nature and the alternative motion to amend the application complies with the General Rules of Practice, the amendment will be allowed. A ruling on American Trucking's motion to strike the letter request, therefore, is moot. Consolidated, by letter dated April 18, 1962, requested that its opposition to the application be withdrawn if the requested amendment were granted.

CONCLUSIONS

In line with the decision in *Rock Island M. Transit Co. —Purchase—White Line M. Frt.*, 40 M.C.C. 457, the Commission has required that an affiliate of a railroad which proposes a service that is neither auxiliary to, nor supplemental of existing service, demonstrate the existence of "special circumstances" which warrants favorable action. Where, as here, a railroad affiliate seeks to obtain authority to off-rail points, it is necessary that the applicant meet this burden of proof. Compare No. MC-78786 (Sub-No. 236), *Pacific Motor Trucking Co. Extension—Automobiles*, 91 M.C.C.—(decided June 28, 1962), and cases cited therein.

One of the primary issues presented here is whether service to a point located within a railroad's terminal

zone for the purpose of so-called exempt operations under TOFC plan II, pickup and delivery, but outside the Commission's prescribed motor vehicle commercial zone, constitutes service to a rail point. We think not. The term "rail point" may be coextensive with a railroad's terminal zone for the purpose of rail service, but the proposed service here is a motor carrier service subject to part II of the Interstate Commerce Act. Compare, *New York Central Transport Co.—Modification*, 89 M.C.C. 389, wherein applicant's contentions are extensively discussed.

It is clear, therefore, that for a railroad-motor carrier affiliate to provide a motor carrier service in its own right it must have appropriate motor operating authority. Thus, although service may be provided to a point located in the parent railroad's terminal zone as an incident to TOFC plan II rail service, motor operating authority is needed to serve the same point in an all-motor service. Nor do we believe that the mere fact that applicants are able to perform the same physical operation under TOFC plan II as they propose here under TOFC plan III is a sufficient basis for extending their motor operating authorities without regard to proof of the existence of special circumstances. In addition, Motor Transit's assertion that it is not necessary to prove special circumstances in each proceeding is not in conformity with the Commission's decision in *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91.

Furthermore, in No. MC-82 (Sub-No. 11), *Best Way of Indiana, Inc., Extension—Oakbrook, Ill.* (not printed), wherein the examiner's recommended order became effective by operation of law on October 9, 1961, 28 independent motor carriers were granted authority to serve Kodak's plant at Oakbrook.[3] The applications of these

[3] The applications involved here were heard on the same consolidated record.

carriers were unopposed and certificates have now been issued to 27 of the 28 applicants. These carriers should be afforded a reasonable opportunity to provide the needed service to the full extent of their authority before any additional service is authorized, and, even though they are not protestants herein, the Commission may take official notice of its outstanding grants of authority. See *R. B. "Dick" Wilson, Inc., Extension—Nebraska*, 66 M.C.C. 725. Here, there is a plethora of recently granted motor common carrier service available, and no need has been shown which would warrant granting any additional authority.

One further matter remains for consideration. Kodak has requested that, in the event the examiner's recommended denial is sustained, these proceedings be set for further hearing in order that Kodak may demonstrate the "special circumstances" involved. In view of the abundance of motor carrier service available, we are unable to perceive of what factual matter Kodak could produce at a further hearing at this time which would alter our conclusions. In the circumstances, the request must be denied.

We find that applicants have failed to establish that the present or future public convenience and necessity require the proposed operations, and that the applications should be denied.

An appropriate order will be entered.

APPENDIX

Pertinent portions of the examiner's recommended report

These applications, by the respective railroad affiliates, together with 28 other applications filed by independent motor common carriers, also seeking authority to serve the Eastman plant at Oakbrook, were heard by the ex-

aminer, on a consolidated record, at Chicago on July 31, 1961. The applications of the 28 independent carriers, which were unopposed as a result of restrictive amendments made at the time of the hearing, were the subject of a report and recommended order of the examiner served September 8, 1961, in No. MC-82 (Sub-No. 11), Best Way of Indiana, Inc., Extension—Oakbrook, Ill., wherein it was recommended that each of the respective applicants be granted authority to serve the Eastman plant at Oakbrook in connection with presently authorized regular-route operations to and from Chicago. Eastman, the sole supporting shipper, intervened in the proceedings. Unlike the applications of the independent motor carriers, the two rail-subsidiary applications here considered were opposed by American Trucking Associations, Inc., Consolidated Freightways Corporation of Delaware, and an affiliate of the latter, New York Consolidated Freightways Corporation, hereinafter called ATA and Consolidated, respectively.

The Transport Company holds certificates of public convenience and necessity issued by this Commission authorizing motor common carrier operations in the transportation of general freight over a network of regular routes extending eastward from Chicago and generally paralleling the lines of its parent railroad. Operations over these routes are subject to the usual conditions designed to restrict the service to be rendered to one auxiliary to or supplemental of the rail service of the New York Central, and applicant is not authorized to serve any point not a station on the lines of that railroad.

Motor Transit holds certificates issued by this Commission authorizing motor common carrier operations over a network of routes extending westward from Chicago and generally paralleling the lines of its parent railroad. In some respects, operations over these routes are subject to the usual "auxiliary to or supplemental of rail" re-

strictions, but in other respects they are not so encumbered. One of its unrestricted routes, extending between Chicago and Silvis, Ill., approaches the Oakbrook site, but it is not authorized to serve intermediate points on such route.

There is no serious dispute as to the facts. Briefly Eastman manufactures a wide variety of photographic materials and equipment at its home office and plant in Rochester, N. Y., which are distributed to dealers and industrial users throughout the country. We are here concerned with the distribution out of its Midwestern Sales Division at Chicago. The Midwestern Sales Division embraces some 17 States in the midwestern section of the country, extending as far west as Montana, as far south as Arkansas, and as far east as Ohio. All distribution within the 17-State area moves out of the Midwestern Sales Division facility at Chicago. The total outbound tonnage in 1960 amounted to some 29½ million pounds, of which 96 percent moved by motor vehicle. The Chicago facility is stocked from the several manufacturing plants of the company at Rochester, and the tonnage moved from Rochester to Chicago in 1960 amounted to over 36 million pounds, 60 percent of which moved by motor vehicle.

This proceeding arises as a result of a determination by Eastman to move its Chicago facilities to larger and more modern quarters at Oakbrook. The Oakbrook site is in Du Page County, Ill., approximately 18 miles due west of Downtown Chicago. It is west of Illinois Highway 83, north of U.S. Highway 34, and south of the East-West Tollway running between Chicago and Aurora, Ill. It is some 2½ miles beyond the western limits of the Chicago commercial zone as defined by the Commission. The plant site area is not served by rail, and Eastman considers that rail facilities are unnecessary and unanticipated. It does desire, however, to have available at the

new site as much, and possibly more, motor service than that now enjoyed at the Chicago site and hence supports most of the applications involved in the instant proceeding, in order that it may be assured of fast, dependable, single-line motor service for the delivery of its products with the dispatch required. Some of Eastman's products, including film and sensitized paper, require refrigeration in transit.

The largest volume of outbound traffic moves to key cities in the sales territory in so-called pool truck shipments. These key cities are Minneapolis and St. Paul, Minn., Milwaukee, Wis., Kansas City, Mo., Cincinnati, Ohio, Louisville, Ky., Des Moines and Sioux City, Iowa, St. Louis, Mo., Indianapolis, Ind., and Omaha, Nebr. There is a substantial volume of less-than-truckload traffic, however, and smaller shipments are dispatched from time to time to almost every community of any size in the territory. Eastman appears to have utilized the service of Motor Transit to some extent with respect to less-than-truckload shipments out of Chicago. It does not utilize the service of the Transport Company except to the extent that the latter has performed certain local pickup and delivery services for Eastman in connection with a plan III trailer-on-flatcar (TOFC) service of the New York Central from Rochester to Chicago. Under the present arrangement, the Transport Company leases the trailers to Eastman and Eastman engages the Transport Company to move such trailers from the Rochester plant to the railroad's Rochester terminal and from the railroad's Chicago terminal to Eastman's Chicago facility. A similar arrangement would purportedly be affected if the instant application of the Transport Company were granted, except that the latter would make ultimate delivery at Oakbrook, rather than to Eastman's Chicago plant.

Evidence in opposition to the applications was submitted on behalf of Consolidated. It conducts substantial operations as a motor common carrier of general freight over a network of routes extending the length and breadth of Eastman's midwestern sales territory. It serves Oakbrook, and a great many points on the lines of both the Transport Company and Motor Transit. Among other points, it serves Rochester and is in a position to provide direct single-line service between Rochester and Oakbrook. There is no indication as to the extent, if any, to which it has handled traffic for Eastman in the past.

APPENDIX E

INTERSTATE COMMERCE COMMISSION

Served March 16, 1962

* * * *

No. MC-67916 (Sub-No. 20)[1]

NEW YORK CENTRAL TRANSPORT COMPANY EXTENSION—OAKBROOK, ILL.

Decided ————

* * * *

REPORT AND ORDER

RECOMMENDED BY WILLIAM E. MESSER, HEARING EXAMINER

By application filed June 20, 1961, as amended, in No. MC-67916 (Sub-No. 20), New York Central Transport Company, a corporation, of New York, N. Y., hereinafter called the Transport Company, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, between Chicago, Ill., and the plant site of the Eastman Kodak Company at Oakbrook, Ill., over irregular routes.[2] Applicant is a subsidiary of the New York Central Railroad.

By application filed June 23, 1951 [sic], as amended, in No. MC-29130 (Sub-No. 92), The Rock Island Motor Transit Company, a corporation, of Des Moines, Iowa, hereinafter called Motor Transit, seeks a certificate of

[1] This report also embraces No. MC-29130 (Sub. No. 92), The Rock Island Motor Transit Company Extension—Oakbrook, Ill.

public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with certain exceptions, serving the site of the Eastman plant described above, as an off-route point in connection with presently authorized regular-route operations to and from Chicago.[2] Applicant is a subsidiary of the Chicago, Rock Island and Pacific R. R. Co.

These applications, by the respective railroad affiliates, together with 28 other applications filed by independent motor common carriers, also seeking authority to serve the Eastman Plant at Oakbrook, were heard by the examiner, on a consolidated record, at Chicago on July 31, 1961. The applications of the 28 independent carriers, which were unopposed as a result of restrictive amendments made at the time of the hearing, were the subject of a report and recommended order of the examiner served September 8, 1961, in No. MC-82 (Sub-No. 11), *Best Way of Indiana, Inc., Extension—Oakbrook, Ill.*, wherein it was recommended that each of the respective applicants be granted authority to serve the Eastman plant at Oakbrook in connection with presently authorized regular-route operations to and from Chicago.[3] Eastman, the sole supporting shipper, intervened in the proceedings. Unlike the applications of the independent motor carriers, the two rail-subsidiary applications here considered were opposed by American Trucking Associations, Inc., Consolidated Freightways Corporation of Delaware, and an affiliate of the latter, New York Consolidated Freightways Corporation, hereinafter called ATA and Consolidated, respectively.

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[2] Restricted against the handling of traffic originating at or destined to, points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties.

[3] Most of the orders in these cases have become effective and appropriate certificates have been issued.

The Transport Company holds certificates of public convenience and necessity issued by this Commission authorizing motor common carrier operations in the transportation of general freight over a network of regular routes extending eastward from Chicago and generally paralleling the lines of its parent railroad. Operations over these routes are subject to the usual conditions designed to restrict the service to be rendered to one auxiliary to or supplemental of the rail service of the New York Central and applicant is not authorized to serve any point not a station on the lines of that railroad.

Motor Transit holds certificates issued by this Commission authorizing motor common carrier operations over a network of routes extending westward from Chicago and generally paralleling the lines of its parent railroad. In some respects, operations over these routes are subject to the usual "auxiliary to or supplemental of rail" restrictions, but in other respects they are not so encumbered. One of its unrestricted routes, extending between Chicago and Silvis, Ill., approaches the Oakbrook site, but it is not authorized to serve intermediate points on such route.

There is no serious dispute as to the facts. Briefly, Eastman manufactures a wide variety of photographic materials and equipment at its home office and plant in Rochester, N. Y., which are distributed to dealers and industrial users throughout the country. We are here concerned with the distribution out of its Midwestern Sales Division at Chicago. The Midwestern Sales Division embraces some 17 States in the midwestern section of the country, extending as far west as Montana, as far south as Arkansas, and as far east as Ohio. All distribution within the 17-State area moves out of the Midwestern Sales Division facility at Chicago. The total outbound tonnage in 1960 amounted to some 29½ million pounds, of which 96 percent moved by motor vehicle. The

Chicago facility is stocked from the several manufacturing plants of the company at Rochester, and the tonnage moved from Rochester to Chicago in 1960 amounted to over 36 million pounds, 60 percent of which moved by motor vehicle.

This proceeding arises as a result of a determination by Eastman to move its Chicago facilities to larger and more modern quarters at Oakbrook. The Oakbrook site is in Du Page County, Ill., approximately 18 miles due west of Downtown Chicago. It is west of Illinois Highway 83, north of U. S. Highway 34, and south of the East-West Tollway running between Chicago and Aurora, Ill. It is some 2½ miles beyond the western limits of the Chicago Commercial Zone as defined by the Commission. The plant site area is not served by rail, and Eastman considers that rail facilities are unnecessary and unanticipated. It does desire, however, to have available at the new site as much, and possibly more, motor service than that now enjoyed at the Chicago site and hence supports most of the applications involved in the instant proceeding, in order that it may be assured of fast, dependable, single-line motor service for the delivery of its products with the dispatch required. Some of Eastman's products, including film and sensitized paper, require refrigeration in transit.

The largest volume of outbound traffic moves to key cities in the sales territory in so-called "pool truck" shipments. These key cities are Minneapolis and St. Paul, Minn., Milwaukee, Wis., Kansas City, Mo., Cincinnati, Ohio, Louisville, Ky., Des Moines and Sioux City, Iowa, St. Louis, Mo., Indianapolis, Ind., and Omaha. Nebr. There is a substantial volume of less-truckload traffic, however, and smaller shipments are dispatched from time to time to almost every community of any size in the territory. Eastman appears to have utilized the service of Motor Transit to some extent in respect of less-

truckload shipments out of Chicago. It does not utilize the service of the Transport Company except to the extent that the latter has performed certain local pickup and delivery services for Eastman in connection with a Plan III trailer-on-flatcar (TOFC) service of the New York Central from Rochester to Chicago.[4] Under the present arrangement, the Transport Company leases the trailers to Eastman and Eastman engages the Transport Company to move such trailers from the Rochester plant to the railroad's Rochester terminal and from the railroad's Chicago terminal to Eastman's Chicago facility. A similar arrangement would purportedly be effected if the instant application of the Transport Company were granted, except that the latter would make ultimate delivery at Oakbrook, rather than to Eastman's Chicago plant.

Evidence in opposition to the applications was submitted on behalf of Consolidated. It conducts substantial operations as a motor common carrier of general freight over a network of routes extending the length and breadth of Eastman's midwestern sales territory. It serves Oakbrook, and a great many points on the lines of both the Transport Company and Motor Transit. Among other points, it serves Rochester and is in a position to provide direct single-line service between Rochester and Oakbrook. There is no indication as to the extent, if any, to which it has handled traffic for Eastman in the past.

The real and primary issue here presented is whether a motor carrier subsidiary of a railroad should be authorized to serve a non-rail point. In the opinion of this examiner, it should not, at least not in the absence of special and unusual circumstances. There is no question here concerning substituted motor-for-rail service because

[4] Plan III TOFC service is a railroad terminal-to-terminal service with the shipper providing the trailers and arranging for pickup at origin and delivery at destination.

rail service is not available. The situation here falls squarely within the principles announced in *Frisco Transp. Co., Extension—Springfield Airport*, 49 M.C.C. 63, wherein the Commission, Division 5, stated:

> The "unusual circumstances" which would justify a grant to a railroad or railroad affiliate of unrestricted authority to serve a particular point or route are not discussed in the quoted report (*Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M.C.C. 221, 28 M.C.C. 5), but we think it clear that in no event would a grant of authority to a railroad or railroad affiliate to serve a non-rail point be justified unless it appeared that otherwise the point or route in question would definitely lack reasonably adequate service by motor carrier, which service no independent motor carrier is able or willing to furnish. The airport here proposed by the applicant is adjacent to Springfield, a city of more than 60,000 population, in and through which many motor carriers operate.

These principles have consistently been adhered to by the Commission and supported by a number of Court decisions. No special or unusual circumstances are here shown to exist which would justify a departure from the general rule and the examiner concludes that the instant applications must be denied.

Motor Transit, on brief, argues that the necessary special and unusual circumstances have long since been established in respect of its unrestricted operations in the area, and need not be reestablished here. This argument is entirely without merit. True, we have granted Motor Transit some unrestricted authority, based upon a finding of special circumstances. However, in *Rock Island Motor Transit Co., Com. Car. Application*, 63 M.C.C. 91 (108), the Commission definitely indicated that each application seeking authority for unrestricted rights must be decided on its own merits and that each

case of such character must be determined upon the facts disclosed in that particular matter.

The transport Company, in its brief, indicates a willingness to accept a restriction limiting its service to one which is auxiliary to or supplemental of rail service. Such a restriction is inappropriate in connection with a grant of authority to serve a non-rail point. Nor, as urged, is the mere fact that the Transport Company owns the trailers to be utilized in the proposed service of any significance in determining the issues involved.

Upon consideration of the evidence of record, the examiner finds, in Nos. MC-67916 (Sub-No. 20) and No. MC-29130 (Sub-No. 92) that the respective applicants have failed to establish that the operations proposed are or will be required by the present or future public convenience and necessity, and that the considered applications should be denied. In view of the findings herein, it is recommended that the appended order be entered.

By William E. Messer, Hearing Examiner.

/s/ WILLIAM E. MESSER

Recommended by William E. Messer,
Hearing Examiner.

/s/ WILLIAM E. MESSER

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the ..... day of ....., A.D. 1962

No. MC-67916 (Sub-No. 20)

NEW YORK CENTRAL TRANSPORT COMPANY
EXTENSION—OAKBROOK, ILL.

No. MC-29130 (Sub-No. 92)

THE ROCK ISLAND MOTOR TRANSIT COMPANY
EXTENSION—OAKBROOK, ILL.

Investigation of the matters and things involved in these proceedings having been made, said applications upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceedings, having been duly sumitted:

It is ordered, That said applications be, and they are hereby, denied.

And it is further ordered, That this order shall be effective on .....

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX F

STATUTES INVOLVED

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U.S.C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

REGULATION IN GENERAL; CAR SERVICE; ALTERATION OF LINE

SEC. 1. [*As amended June 29, 1906, April 13, 1908, June 18, 1910, May 29, 1917, August 10, 1917, February 28, 1920, June 19, 1934, August 9, 1935, September 18, 1940, June 24, 1948, August 2, 1949, August 12, 1958.*] [*49 U.S.C. § 1.*]

* * * *

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

SEC. 5. [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940, and August 2, 1949.*] [*49 U.S.C.* §5.]

* * * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part

thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reason-

able, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

APPLICATION OF PROVISIONS

SEC. 202. [*August 9, 1935, amended September 18, 1940, May 16, 1942.*] [*49 U.S.C. § 302.*] (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

* * * * *

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

* * * * *

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an

express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.*] [*49 U.S.C. § 306.*] (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on an public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served

by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U.S.C. § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the

certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

FILED
APR 8 1967
JOHN F. DAVIS, CLERK

No. 1046

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO AFFIRM

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April, 1967.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1046

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO AFFIRM

Appellee, New York Central Transport Company (hereinafter sometimes referred to as "Transport"), pursuant to Paragraphs 1(a) and 1(c) of Rule 16 of the Revised Rules of this Court, moves that this appeal be dismissed, or, in the alternative, that the judgment of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to require further argument.

Statement

To avoid repetition, Transport adopts and incorporates herein by reference that portion of the "Statement" contained in the Motion submitted by the United States and the Interstate Commerce Commission which pertains to Transport.[1] Transport must emphasize, however, that appellant's "Statement" neglects to mention that the Commission *denied* Transport's application (J.S. 41-45).[2]

---

[1] Transport's application before the Interstate Commerce Commission was docketed as No. MC-67916 (Sub-No. 20) and styled New York Central Transport Company Extension—Oakbrook, Ill.

[2] This and similar references are to the pages of the Jurisdictional Statement filed by Appellant.

Argument

Although appellant sets forth in three separately numbered paragraphs its statement of the "Questions Presented", these questions in fact present but a single question for review. That question is whether or not in administering the Interstate Commerce Act the Interstate Commerce Commission (hereinafter sometimes referred to as "Commission") has disregarded the prior expressions of this Court in *American Trucking Associations* v. *U. S.*, 355 U. S. 141 (1957), and *American Trucking Associations* v. *U. S.*, 364 U. S. 1 (1960).

This question must be answered in the negative since it is uncontroverted that the service to be performed by Transport to and from Oakbrook, Ill. is within the terminal area of its parent, The New York Central Railroad Company (sometimes hereinafter referred to as "Central"), as defined in the latter's tariffs. Moreover, Transport's service at Oakbrook, Ill., as an operation within the terminal area of Central, has by its very nature "a limitation of function" (364 U. S. 1, 9), i.e., a prior or subsequent movement via Central's line of railroad to or from Chicago. Thus, contrary to the assertion of appellant, the Commission's order herein not only does not do "violence to Congressional policy", but it also is consistent with and implicitly affirms that policy which has "found favor in this Court" (364 U. S. 1, 9). It is submitted that in these circumstances the judgment of the District Court is so manifestly correct that this appeal presents no substantial question warranting plenary consideration by this Court.

1. It is unnecessary even to consider appellant's question, however, because appellant has suffered no legal wrong, actual or threatened, by reason of the Commission's orders herein. Appellant is but an association composed of "trucking associations"; it has no independent interest or

right which is affected by the Commission's orders. In fact, the only motor carrier protestant in the proceedings before the Commission withdrew its opposition in April, 1962, when Transport amended its application "so as to restrict the proposed service to traffic which has either a prior or subsequent rail movement". The law is clear that appellant has no status under Sections 1336, 1398 and 2321-2325 of the Judicial Code (28 U.S.C. §§ 1336, 1398, 2321-2325) to seek judicial review of an order which does not invade or affect any interest of appellant. *Sprunt & Son* v. *United States*, 281 U. S. 249, 255 (1930); *Pittsburgh & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, 486 (1930); *Moffat Tunnel League* v. *U. S.*, 289 U. S. 113, 119 (1933); *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 130 F. Supp. 76, 78 (E. D. Mo., 1955); *Group of Boston & P.R.C. Stock* v. *Interstate Com. Com'n*, 133 F. Supp. 488, 492-3 (E. D. Va., 1955); *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 751-2 (D. Del., 1961); *National Motor Freight Traffic Association* v. *United States*, 205 F. Supp. 592, 593 (D. C., 1962).

This Court also has noted that there is a clear distinction between the right to intervene in proceedings before the Commission and the right "to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it". *Pittsburgh & W. Va. Ry.* v. *U. S., supra*, at page 486; *Sprunt & Son* v. *U. S., supra; Atchison, Topeka and Santa Fe Ry. Co.* v. *U. S., supra.*

Recently the District Court for the District of Columbia stated that appellant "lack(s) status to maintain this action". *American Trucking Associations, Inc.* v. *U. S.*, 242 F. Supp. 597, 601 (D. C., 1965), affirmed 382 U. S. 373 (1966). That case did not turn on this issue because the Court upheld the Commission's order upon the merits. Here, American Trucking Associations, Inc., is the sole

party appellant. Thus the situation is clearly distinguishable from that in *American Trucking Associations* v. *U. S.*, 355 U. S. 141, and *American Trucking Associations* v. *U. S.*, 364 U. S. 1. In both of the latter appeals, several individual motor carriers, with justiciable interests, sued to set aside the Commission's orders. Intervention under Section 2323 of the Judicial Code (28 U.S.C. § 2323) by an association which participated at the Commission level is specifically authorized but this does not contemplate the independent institution of judicial review of Commission orders by persons lacking legal status to maintain such suits. See *Moffat Tunnel League* v. *U. S.*, *supra*, at page 119 and *Group of Boston and P.R.C. Stock* v. *Interstate Commerce Commission*, *supra*, at page 492.

The Court below expressed (J.S. 24, Fn.) a desire to dismiss the complaint for lack of standing of appellant to maintain the suit, but mistakenly concluded that this Court had "ruled otherwise", citing *American Trucking Associations* v. *U. S.*, 355 U. S. 141, 144 (1957). Examination of the cited case will reveal that the question of "standing to sue" therein determined was that of Railway Labor Executives' Association in Case No. 8, not that of the instant appellant, whose appeal was No. 6. This Court's conclusion as to the status of the labor association presents a wholly different issue of law in the light of the intent of Congress set forth in §§ 17(11) and 205(h).[3] The standing of appellant to institute and maintain an independent suit under Sections 1336, 1398 and 2321-2325 of the Judicial Code (28 U.S.C. §§ 1336, 1398 and 2321-2325), has not been determined by this Court to the knowledge of this appellee. Consistent with the prior expressions of this Court, this appeal should be dismissed for want of legal status of appellant to maintain this suit.

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[3] Unless otherwise indicated, sections referred to herein are of the Interstate Commerce Act.

2. It is apparent from appellant's "Questions Presented" that it has misconstrued this Court's prior decisions interpreting the Congressional policy of § 5(2)(b), as applied to § 207. The Congress has expressed no "policy against rail entry into the motor-carrier field" (J.S. 3), so long as the motor carrier service to be provided by the rail affiliate is auxiliary to or supplemental of rail service. Such a functional limitation satisfies the requirement that a rail carrier shall use its motor carrier affiliate's service to public advantage in its rail operations. *American Trucking Associations* v. *U. S.*, 364 U. S. 1, 9.

In the Report of the Commission on Reconsideration (J.S. 46-56) the Commission correctly found that the rail-affiliated applicants had established the "special circumstances" required to satisfy the "public advantage" mandate of § 5(2)(b), even without a functional limitation upon the operating rights sought (J.S. 53-4). In the Report of the Commission on Further Consideration (J.S. 31-45), however, the Commission upon further reflection concluded that there was no need to do a vain thing. Inasmuch as Transport was merely seeking authority to handle traffic restricted to prior or subsequent rail movements (J.S. 43) and could serve Oakbrook, Ill. as a point within Central's Chicago terminal area as the latter is presently defined in Central's tariff,[4] the Commission determined that sound regulatory policy dictated a denial of Transport's application (J.S. 40-1).

3. Appellant concedes (J.S. 21) that rail terminal areas are governed by tariff. Well it might, for in another proceeding involving appellant, Transport, and their respec-

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[4] At page 15 of its reply brief to the District Court, dated August 1, 1966, appellant "challenge(d) the Commission and the Transport Company to cite a tariff showing that Central holds itself out to provide service at Oakbrook." Appendix A hereto is a copy of page 85 of Central's currently effective Freight Tariff 6602-D, I.C.C. No. 2395.

tive counsel before this Court, the terminal operations of Transport were specifically considered. *New York Central Transport Co.—Modification,* 89 M.C.C. 389, 397-400 (1962). Thus, nearly five years ago appellant was put on notice that an operating rights proceeding was an inappropriate forum for establishment of territorial limits of a railroad's terminal area. The Commission's consideration of this subject in the case cited reflects the position consistently taken by the Commission. Other applications for operating rights by rail affiliated motor carriers which have been denied for the same reason as the denial of Transport's application in the instant case are *Pennsylvania Truck Lines Inc. Com. Car. Application,* 33 M.C.C. 21, 33 (1942), and *Delaware, L. & W. R. Co. Extension—Corning, N. Y.,* 53 M.C.C. 614, 616 (1951).

The existence of rail terminal areas long antedated the enactment of Part II of the Interstate Commerce Act. The partial exemption conferred by § 202(c)(2) compelled no change in the practice of defining rail terminal areas. If appellant believes that the fair and impartial regulation required by the National Transportation Policy suggests that motor carrier terminal areas also be fixed by tariff, proceedings toward that end should be instituted by appropriate petition to the Commission and not by collateral attack in this Court. Meanwhile, the District Court found Oakbrook "is properly described in a tariff of the New York Central Railroad as being within the railroad company's Chicago terminal area" (J.S. 29).

4. Nor is appellant upon sound ground in advancing the argument that the Commission has by its action herein ignored the requirements of § 1(18) (J.S. 15). It was well settled, even prior to the enactment of Part II of the Interstate Commerce Act, that operation of trucks within rail terminal areas, extending transportation service to parts of the terminal area not reached by established lines

of railroad, is not an extension of the railroad requiring a certificate of public convenience and necessity under § 1(18). In *New York Dock Ry.* v. *Pennsylvania R. Co.*, 62 F. (2d) 1010, 1014 (Third Circuit, 1933), cert. den. 289 U. S. 750 (1933), the court concluded:

> "* * * we hold that the proposed accessorial terminal service by trucks is not a 'railroad,' nor is it a 'line of railroad,' nor 'an extension of a line of railroad,' but it is a service of transportation which may be rendered by the defendant railroad company without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity, subject of course to tariffs filed and allowed."

More recently a similar situation was considered by the Commission in *New York Central R. Co. Station at Jay Street Terminal*, 310 I.C.C. 211 (1960). In that proceeding Central proposed to establish a *new, off-track station* in Brooklyn and serve such station by truck from its railroad stations in Manhattan and Weehawken, N. J. The analogy to the motor service proposed between Central's rail station in Chicago and Oakbrook, Ill. is self-evident. Despite vehement objections of the rail carriers serving Brooklyn and to "enable the respondent (Central) to meet more effectively over-the-road truck competition" the Commission approved the proposal and concluded that such establishment of a new service did not require a Certificate, stating at page 220:

> "It is well settled that the establishment or maintenance of motor truck service by a common-carrier railroad does not constitute an extension of a line of railroad within the meaning of section 1(18) for which a certificate of public convenience and necessity is required." *Drayage and Unloading at Jefferson City*, Mo., 206 I.C.C. 436, 439.

For reasons stated in Judge Friendly's exhaustive opinion, the Second Circuit upheld the interpretation of the Commission in *Long Island Rail Road Co.* v. *New York Central R. Co.*, 281 F. (2d) 379 (1960).

Conclusion

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed, or, in the alternative, that the judgment of the United States District Court for the District of Columbia should be affirmed at least insofar as it upheld the order of the Interstate Commerce Commission in Docket No. MC 67916 Sub-No. 20.

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April, 1967.

Proof of Service.

I, Kenneth H. Lundmark, one of the attorneys for New York Central Transport Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of April, 1967, I served copies of the foregoing Motion to Dismiss, or, in the Alternative, to Affirm on the several parties hereto, as follows:

1. On the United States of America, by mailing copies in duly addressed envelopes, with first class postage prepaid, to Honorable Thurgood Marshall, Solicitor General, Honorable Donald F. Turner, Assistant Attorney General, Howard E. Shapiro, Esq., Richard A. Wegman, Esq., and Jerry Z. Pruzansky, Esq., Department of Justice, Washington, D. C. 20530; and David G. Bress, United States Attorney for the District of Columbia, U. S. Courthouse, Washington, D. C. 20001.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed enevlopes, with first class postage prepaid, to Robert W. Ginnane, Esq., its General Counsel and Leonard S. Goodman, Esq., its Assistant General Counsel, at the offices of the Commission, Washington, D. C. 20423.

3. On American Trucking Associations, Inc., by mailing copies in duly addressed envelopes, with first class postage prepaid, to its counsel of record, Peter T. Beardsley, Esq., Richard A. Mehley, Esq., and Harry J. Jordan, Esq., 1616 P Street, N. W., Washington, D. C. 20036.

4. On Rock Island Motor Transit Company, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its counsel, Martin L. Cassell, Esq., Theodore E. Desch, Esq., George M. Mariner, Esq., and Thomas I. Megan, Esq., 139 W. Van Buren St., Chicago, Ill. 60605; and Walter J. Myskowski, Esq., 712 Ring Building, Washington, D. C. 20036.

KENNETH H. LUNDMARK.

APPENDIX A

NYC Freight Tariff 6602-D

(Item 140)

Areas of Stations Referred to on Pages 67 to 82 From and to Which Rates Apply

Chicago, Ill., Corporate limits of:

Service under the provisions of this tariff at Chicago, Ill., and points within the Chicago Switching District as described in IFA Tariff 20-Z, ICC 1006, will be accorded to the extent and as provided in the said IFA Tariff 20-Z, ICC 1006. Except as otherwise provided, rates published herein from or to, as the case may be, Chicago, Ill., will also apply from or to the following points (see Note 1):

Illinois	*Illinois*	*Illinois*	*Illinois*
Alsip	Dolton	Justice	Parkway
Argo	Dunning	La Grange	Phoenix
Bedford Park	East Hazel Crest	La Grange Park	Posen
Bellwood	East Main	Lansing (Cook	Proviso
Bensenville Yds.	Elk Grove Village	County)	Rhodes
Berger	(Bryn Mawr	Lincolnwood	Riverdale
Berkeley	District)	Lyons	River Forest
Bernice	Elmwood Park	McCook	River Grove
Berwyn	Evanston	Mannheim	Riverside
Blue Island	Evergreen Park	Markham	Robbins
Bridgeview	Fairview	Maywood	Rosemont
Broadview	Forest Park	Melrose Park	Schiller Park
Brookfield	Forest View	Merrionette Park	Skokie
Bryn Mawr	Franklin Park	Midlothian	South Chicago
Burnham	Glenn	Morton Grove	South Holland
Burr Oak	Globe	Mount Forest	Spring Forest
Calumet City	Goeselville	Niles	Stickney
Calumet Park	Golf	Norpaul	Stone Park
Chicago Heights	Haney	Norridge	Summit
Chicago Ridge	Harvey	North Lake	Thornton
Cicero	Harwood Heights	North Riverside	Tinley Park
Clearing	Hawthorne	Oakbrook	Westchester
Clyde	Hazel Crest	Oak Forest	Western Springs
Congress Park	Hickory Hills	Oak Glen	Willow Springs
Crestwood	Hillside	Oak Lawn	Wireton
Des Plaines	Hines	Oak Park	Worth
Deval	Hodgkins	Orchard Place	Yard Center
Dixmoor	Hometown	Palos Heights	
	Homewood	Park Ridge	

(Item 140 continued)

also any other location within the following described boundaries:

Beginning at a point on the south shore of Lake Michigan where the shore line converges with the Illinois-Indiana State Line: thence southward along the Illinois-Indiana State Line to 183rd Street; thence westward along 183rd Street (known for a short distance at Pearl Street and Beach Avenue) to South Harlem Avenue; thence northward along Harlem Avenue to West 87th Street; thence westward along 87th Street to old bed of Des Plaines River; thence southwestward along the old bed of the Des Plaines River to the DuPage-Cook County Line; thence northward along DuPage-Cook County Line to Mt. Prospect Road, at its junction with Devon Avenue; thence continuing northward along Mt. Prospect Road to Central Road; thence eastward along Central Street to the west shore of Lake Michigan; thence southward and eastward along the shore line (including piers) of Lake Michigan to the point of beginning.

Indiana	*Indiana*	*Indiana*	*Indiana*
East Chicago	Hammond	Munster	South Hammond
Gary	Hessville	North Hammond	State Line
Gibson	Indiana Harbor	Osborn	Whiting
Grasselli	Maynard	Roby	Wolf Lake

also any other location within the following described boundary, beginning on the shore of Lake Michigan, due north of Pine Junction, Ind., thence south to and including Pine Junction (including freight interchanged between the IHB and Wabash at Tolleston, Ind.); thence west to and including Clarke Junction, Ind.; thence southwesterly and south just west of the EJ&E to, but not including Ivanhoe, Ind.; thence southwesterly to and including Hessville, Ind.; thence westerly along the north bank of the Little Calumet River to Columbia Avenue (Hammond, Ind.); thence south on Columbia Avenue to Ridge Road; thence in a southwesterly direction on Dyer Road to a point one-half mile north of the GTWRR; thence in a southeasterly direction along a line one-half mile north of and parallel to the GTWRR to a point near the intersection of 45th Avenue and U. S. Highway 41; thence south along the west side of U. S. Highway 41 to a point north of the NYC(M)RR; thence in a southwesterly direction along a line north of and parallel to the NYC(M)RR to a point one-half mile west and south of the PRR; thence in a westerly direction to a point just north of the Dyer, Ind., yard limit on the MononRR, thence due west to the Illinois-Indiana State Line.

Note 1—Where specific rates are published herein from or to (as the case may be), a point named in this item, the provisions of this item do not apply from or to (as the case may be), that point.
(N1219-6127-8978)

For Explanation of Abbreviations and Reference Marks, see last page of this tariff.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANT,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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IN THE

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v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

The Rock Island Motor Transit Company (hereinafter referred to as "Motor Transit"), one of the appellees in the above-entitled matter, moves that this appeal be dismissed because of appellant's lack of standing or, in the alternative, that the final judgment of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment by a District Court of three judges specially constituted pursuant to 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325, dismissing appellant's complaint which sought to set aside an order of the Interstate Commerce Commission.

The order of the Commission under attack granted to Motor Transit authority to serve the site of a new Eastman Kodak Company plant located at Oakbrook, Illinois, 2½ miles beyond the western limits of the Chicago Commercial Zone. The Commission found that "special circumstances" were present in the proceeding which supported and justified the grant of unrestricted motor carrier authority to Motor Transit.

Eastman requested Motor Transit and other motor carriers serving its old plant at Chicago to seek authority from the Commission to serve the new plant site. Thirty applications by these carriers under Section 206 of the Interstate Commerce Act, 49 U.S.C. 306, were filed, including 28 by independent motor carriers and two by motor carriers affiliated with railroads, including Motor Transit.

A hearing was held at Chicago on a consolidated record for all applicants before the Commission at which no applicant opposed any other applicant and Eastman appeared and introduced the same evidence in support of all applicants. The examiner recommended the grant of all the independent motor carrier applications (27 of which resulted in certification) but he recommended against the grant of authority to both rail affiliates. Exceptions were filed to the examiner's report to which appellant made reply. Thereafter the Operating Rights Review of the Commission affirmed the examiner's recommendations and rejected the instant application. Motor Transit filed a petition for reconsideration to which appellant made reply. By a report served June 28, 1963, Division 1 of the Commission found that public convenience and necessity require a grant of the application to Motor Transit. Subsequently, on April 8, 1964, the Commission issued to Motor Transit its certificate authorizing unrestricted service to and from the Eastman

plant at Oakbrook under Section 207 of the Interstate Commerce Act, 49 U.S.C. 307.

In the meantime, appellant, the only real protestant to the grant of authority before the Commission, filed a petition for reconsideration which was denied by the Commission as was appellant's petition for a finding that the proceeding involved an issue of general transportation importance. Appellant, still acting alone, then filed a complaint in the United States District Court for the District of Columbia during the pendency of which the Commission reopened the proceedings on its own motion and by its report served July 7, 1965, reaffirmed the grant of authority to Motor Transit. Appellant's further appeals to the Commission were of no avail and on December 13, 1965, it filed a supplement to its complaint before the District Court to which Motor Transit filed its answer as an intervening defendant.

The court below held unanimously that the Commission correctly concluded that special circumstances were present in this proceeding which amply justified the grant of Motor Transit's application. On that basis it dismissed the complaint insofar as Motor Transit is concerned (Jur. St., p. 29). The court below was also impressed with the argument of the Interstate Commerce Commission that appellant had no standing to attack the Commission's order in this proceeding, the court stating that if the question were open it would be inclined to hold that the appellant lacked standing (Jur. St., p. 24).

ARGUMENT

Although appellant's statement of the questions presented is set forth in three paragraphs, the statement in fact raises only a single question for review insofar as Motor Transit is concerned. That is, whether the Interstate Commerce

Commission properly exercised its discretion in finding that special circumstances were present in the instant proceeding justifying an unrestricted grant of motor carrier authority to this appellee.

A minimal amount of authority was sought by Motor Transit in this proceeding. It already possessed full motor carrier rights in the territory between Omaha and Chicago. Its trucks entered Chicago over U. S. Highway No. 34 which runs immediately adjacent to Oakbrook, a community 2½ miles west of Chicago. The authority granted by the Commission simply permits Motor Transit trucks to handle shipments at the Eastman plant at Oakbrook which became a point intermediate between Chicago and Omaha on Motor Transit's authorized route.

At the hearing before the Commission appellant and an independent motor carrier, Consolidated Freightways, opposed the rail affiliates but not the companion applications of the other motor carriers. The protest of Consolidated Freightways was directed primarily at the application of the other rail affiliate in this proceeding, New York Central Transport, and it withdrew its protest when that carrier offered a restrictive amendment to its application (Jur. St., p. 32). Consolidated Freightways has not participated in the proceeding since the hearing and its protest must be deemed a mere matter of form in this case. Only appellant contests the decision of the Commission and appellant offered no evidence at the hearing.

As seen in appellant's Jurisdictional Statement at page 38, the Commission's decision in this matter reviews the facts of record setting forth the basic findings which led to the ultimate conclusion that there were special circumstances present in this proceeding which supported the grant of authority. Thus, it was shown that the supporting shipper, Eastman, required the continued transportation

services provided by Motor Transit; that no motor carrier effectively opposed the grant of authority; that there was no indication that any motor carrier is able or willing to serve the points which Motor Transit had been serving in the past; and that Eastman would be deprived of a transportation service it had enjoyed in the past and needed for proper utilization of its new Oakbrook facility if Motor Transit's application were denied. Of particular significance is the Commission's finding that since Motor Transit had been serving Eastman at Chicago, the proposed service at Oakbrook would not constitute a new service nor would it inject "a new quantum of competition detrimental to those independent motor carriers which also have been serving Eastman's Chicago plant and which do not oppose the issuance of authority to Motor Transit" (Jur. St., p. 37).

1. Special Circumstances.

It was in this very territory that the law in this field was established by the Commission with approval of the courts. We refer to *Rock Island Motor Transit Company—Common Carrier Applications,* 63 M.C.C. 91 (1954), commonly referred to as the *Second White Line* or *Rock Island Case**. In that proceeding Motor Transit sought unrestricted authority to render motor carrier service between Chicago and Omaha. Although vigorously opposed by independent motor carriers, the Commission granted the application because there were present in the proceeding special circumstances which warranted the grant of unrestricted authority to this rail affiliate. The application covered the territory between Chicago and Omaha. However, the Commission found that Motor Transit already possessed unrestricted

* The *First White Line* or *Rock Island Case* also involved the imposition of restrictions on Motor Transit's operating authority in this area, *United States* v. *Rock Island Motor Transit Co.,* 340 U. S. 419 (1950).

authority between Chicago and Silvis,* Illinois and consequently the new authority covered the segment between Silvis and Omaha, 63 M.C.C., 108.

The order was attacked in the District Court by nine independent motor carriers, as well as by appellant and its Regular Common Carrier Conference, in *American Trucking Associations v. United States*, 144 F.Supp. 365 (1956). The ground urged for reversal was that the Commission did not have power to grant unrestricted certificates to rail affiliates but only certificates restricted to service auxiliary to and supplemental of rail service because of the limitations in Section 5(2)(b) of the Interstate Commerce Act. The District Court rejected this contention in an opinion by Circuit Judge Prettyman who said as follows at page 367:

> "Plaintiffs say that the requirement which appears in Section 5(2)(b) must be read into Section 207(a) and therefore controls in the issuance of certificates where a railroad, or its subsidiary, is the applicant. The Commission says the requirement is notably omitted from the terms of Section 207(a); that the policy, not the terms of the requirement applies to the issuance of certificates under 207(a). It says a policy requirement is not so rigid as a flat requirement in terms but is flexible and permits a grant in exceptional circumstances where the Commission finds that the public interest, convenience and necessity require the grant.
>
> "We agree with the contention of the Commission in the foregoing respect. The case concerns the issuance of a certificate. Certainly the terms of the requirement as to auxiliary and supplementary service do not appear in Section 207(a). It is equally certain that the policy of the requirement, being a basic policy in the statute, does apply. The difference between a rigid requirement and an applicable policy is one of flexibility and permits the Commission to be governed in exceptional circumstances by the needs of the public convenience and necessity."

---

* Near the Mississippi River in the area of Davenport, Rock Island and Moline.

On appeal this decision was upheld by this Court in the landmark case involving a grant of unrestricted motor carrier authority to a rail affiliate, *American Trucking Association* v. *United States,* 355 U.S. 141 (1957). The following statement of the law applicable in matters of this nature appears in the opinion of Mr. Justice Clark:

> "In interpreting Section 207, the Commission has accepted the policy of Section 5(2)(b) as a guiding light, not as a rigid limitation. While it has applied auxiliary and supplementary restrictions in many Section 207 proceedings, the Commission has occasionally issued certificates to railroad subsidiaries without the restrictions where "special circumstances" prevail, namely, where unrestricted operations by the rail-owned carrier are found on special facts and circumstances to be in the public interest. • • •
>
> "We conclude, therefore, that the Congress did not intend the rigid requirement of Section 5(2)(b) to be considered as a limitation on certificates issued under Section 207." (355 U.S., 149-150)

There is no question, therefore, but that the Commission may authorize an unrestricted grant of authority if special circumstances warranting such action are present.

The special circumstance thought important in the *Second White Line* or *Rock Island Case* was the inadequacy of the service performed in the territory by independent motor carriers. That such service is inadequate in the instant proceding is taken from the testimony of Eastman witnesses at the hearing who stated that the shipper needed the continued transportation services of the motor carriers which had been serving it at its Chicago plant, including Motor Transit.

An example of this testimony is found in the evidence of witness James A. Hill, General Manager of the Midwestern

Sales Division of Eastman at Chicago, who said in Exhibit 1 at pages 7-8 as follows:

> "• • • Without the trucking facilities that are now available to us at our old location, our service would be seriously hindered. One line delivery is exceedingly important in order to obtain the type of service that we have been used to extending to our dealers. For this reason, we probably use more truck lines than most companies of comparable size.
>
> • • •
>
> "• • • We sell and ship to customers located in practically every city, town, and hamlet in the Midwest. No rail facilities are available, necessary, or anticipated in the Oakbrook area, so it is essential that we continue receiving the same fine service from our present truckers that we have been receiving over the many years that we have used their facilities, both inbound and outbound."

No such testimony would have been proffered by the shipper if in fact other motor carriers could or would properly serve the new facility at Oakbrook.

More important, perhaps, is the circumstance that in the *Second White Line* or *Rock Island Case* there was strong motor carrier opposition to Motor Transit's efforts to operate free of restrictions. No such opposition is present in the instant proceedings. If Motor Transit's entry into Oakbrook had presented a threat to any independent motor carrier, such carrier would have effectively protested such entry. Failure so to protest leads to the conclusion that either there were no carriers serving Motor Transit's authorized points or that if any such carriers exist they are not concerned about a 2½ mile extension of Motor Transit's authority.

While the presence of opposition in this type of proceeding does not necessarily negative special circumstances,

lack of opposition is a special circumstance warranting grant of authority. In *Burlington Truck Lines, Inc.—Purchase—Pirnie,* 85 M.C.C. 363 (1960), the Commission made these observations at pages 372-373:

> "The general principle of the *White Line* case, that the motor-carrier operating rights of a railroad or its affiliate should usually be restricted solely to a service "auxiliary to and supplemental of" train service of the railroad, has as its primary objective the protection of competing motor carriers from the dual competition of an all-motor service in addition to the rail service. *It is, therefore, a circumstance of considerable importance in a proceeding such as this that the application is not opposed by competing motor carriers to any real extent,* and not at all on the ground that the operating rights to be purchased should be restricted solely to an "auxiliary and supplemental" service. *This record indicates in a general way that many other motor carriers operate in the area served by vendor, but they did not see fit to intervene in the proceeding;* and the record is devoid of details as to the nature and scope of their service, the actual competition, if any, which they provide to vendor, or the extent to which they would be able to absorb and transport efficiently that portion of the traffic, now transported by vendor, which Truck Lines would not be able to transport if these rights were restricted to an 'auxiliary and supplemental' service." (Emphasis supplied)

See also *Rio Grande Motor Way, Inc.—Control and Merger—Carbon Motorway, Inc.,*—90 M.C.C. 643, 649-650 (1963).

Appellant misplaces reliance on two opinions of this Court in support of its appeal. As already seen, in the *Second White Line or Rock Island Case,* the Court sustained the grant of full motor carrier authority to Motor Transit over the objection of appellant and independent motor carriers. In the second opinion relied upon, *Pacific Motor, (American*

Trucking Associations v. *United States,* 364 U.S. 1 (1960), the rail affiliate's application was also opposed by appellant as well as its Contract Carrier Conference, the National Automobile Transporters Association, and six motor carriers. In overturning an award to Pacific Motor the Court cited the Commission's lack of finding that independent motor carriers were unable or unwilling to perform a service as an example of insufficient justification for the award. Such holding, however, does not purport to place the Interstate Commerce Commission in a straight jacket nor to limit nor delineate precisely the discretion of the Commission in determining what are or what are not special circumstances in any particular proceeding (364 U.S., 18).

Whereas independent motor carriers were opposed to the rail affiliate in both the *Second White Line* or *Rock Island Case* and in *Pacific Motor,* no such opposition was present in the instant proceeding. Not only did the independent motor carriers fail effectively to oppose the grant of unrestricted authority, but such grant involves a point, Oakbrook, intermediate on Motor Transit's previously authorized routes. Motor Transit did not seek to provide a new service nor did its proposal inject a new quantum of competition detrimental to independent motor carriers also serving Eastman's Chicago plant.

Beyond these circumstances, we point to other facts in this proceeding which also qualify as "special" in any application of Commission policy in this field. The very history of Motor Transit's operation in this territory must be considered a special circumstance. It was in this very area that the test of special circumstances was laid down in the *Second White Line* or *Rock Island Case* and an associated proceeding before the Commission, MC 29130, Sub 83 now designated Sub 1. Motor Transit has been operating into Chicago without restrictions since 1938. Thus, there is in-

volved only a minimal extension of previously authorized operations.

Finally, the desires of the shipper for continued service by Motor Transit at the new location at Oakbrook presents a special circumstance. The transportation of photographic equipment requires expedited and careful handling which makes necessary the continuation of Motor Transit's services which have been adequately and satisfactorily performed in the past and which should be continued in the future.

The instant case is similar to *Quickie Transport Company* v. *United States,* 169 F.Supp. 826 (1959), affirmed 361 U.S. 36 (1959), wherein the District Court upheld the grant of authority to four independent motor carriers which had been serving a shipper in one location and were certificated by the Commission to continue such service at a new location ten miles away.* The court said at page 829:

> "It seems reasonable to us for the Commission to conclude, in the light of these unchallenged facts, that the 4 regularly licensed carriers now serving the Twin Cities area should have their authority extended to cover the Pine Bend area. *In effect, this is merely a geographical enlargement of the Twin Cities shipping zone to serve approximately the same amount of traffic.*" (Emphasis supplied)

2. Appellant's Lack of Standing.

The court below was impressed with the argument presented to it by the Commission, asserting that appellant had no standing to bring this suit (Jur. St., p. 24). We are informed that the Commission will again plead appellant's lack of standing in this Court. We join in such motion and consider it unnecessary to argue the matter further here.

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* Special circumstances were not involved.

We also refer to Motor Transit's answer to the original complaint filed in the court below wherein it was asserted that Motor Transit is a member of American Trucking Associations, Inc. Further examination discloses that appellant is an association of associations and that at no time material herein has Motor Transit been a member, as such, of American Trucking Associations, Inc.

CONCLUSION

The appeal should be dismissed or, in the alternative, the judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Martin L. Cassell, one of the attorneys for The Rock Island Motor Transit Company, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of April, 1967, I served copies of the foregoing Motion on the several parties hereto, as follows:

1. On the United States of America, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to Honorable Thurgood Marshall, Solicitor General, Honorable Donald F. Turner, Assistant Attorney General, Howard E. Shapiro, Esq., Richard A. Wegman, Esq. and Jerry Z. Pruzansky, Esq., Department of Justice, Washington, D. C. 20530; and David G. Bress, United States Attorney for the District of Columbia, U.S. Courthouse, Washington, D.C. 20001.

2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with air mail postage prepaid, to Robert W. Ginnane, Esq., its General Counsel and Leonard S. Goodman, Esq., its Assistant General Counsel, at the offices of the Commission, Washington, D. C. 20423.

3. On American Trucking Associations, Inc., appellant, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its counsel of record, Peter T. Beardsley, Esq., Richard A. Mehley, Esq., and Harry J. Jordan, Esq., 1616 P Street, N.W., Washington, D. C. 20036.

4. On New York Central Transport Company, intervening defendant below, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its counsel, Gerald E. Dwyer, Esq. and Kenneth H. Lundmark, Esq., 466 Lexington Avenue, New York City, New York 10017.

MARTIN L. CASSELL

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1046

AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This appeal challenges the validity of an Interstate Commerce Commission order authorizing operations by certain motor carriers that are wholly owned

subsidiaries of railroads. Appellant is an association of motor carrier associations which, together with two independent motor carriers, opposed the certification of these subsidiaries before the Commission. The two independent motor carriers subsequently withdrew their opposition (J.S. 3-4), and appellant alone now seeks to overturn the Commission's order.[1]

In 1961, Eastman Kodak Company began construction of a new plant at Oakbrook, Illinois. Oakbrook is located 2.5 miles outside the Chicago commercial zone,[2] but within the terminal area[3] of the New York

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[1] Appellant's standing—by itself—to attack the Commission's order is open to some question. Appellant is an association, not of motor carriers, but of motor carrier associations; and any injury to the associations from the order is, at most, highly speculative. Compare *Associated Industries* v. *Ickes*, 134 F. 2d 694, 699-703 (C.A. 2); *National Coal Assn.* v. *Federal Power Commission*, 191 F. 2d 462 (C.A. D.C.); *MacArthur Liquors, Inc.* v. *Palisades Citizen Assn.*, 265 F. 2d 372 (C.A. D.C.). And, unlike the rate bureau that was the appellant in *National Motor Freight Traffic Assn.* v. *United States*, 371 U.S. 223, on reconsideration, 372 U.S. 246, appellant here has no independent statutory function in the scheme of the Interstate Commerce Act. Finally, as noted in the text, no individual motor carriers have joined with appellant in this appeal. Compare *American Trucking Assns.* v. *United States*, 355 U.S. 141, 146-147; *American Trucking Assns.* v. *United States*, 364 U.S. 1, 5.

[2] The "commercial zone" is the area surrounding a city, within which motor transportation is so local as to be exempt from economic regulation by the Commission. 49 U.S.C. 303 (b)(8).

[3] A "terminal area" is that area surrounding an origin or destination point within which bona fide collection, delivery, or transfer services may be performed (J.S. 33, n. 3). Section 202(c) of the Act, 49 U.S.C. 302(c), provides that motor

Central Railroad at Chicago. Thirty motor common carriers, all of which had served Eastman at its old location, which was within the Chicago commercial zone, applied to the Commission for authority to serve the new plant. Eastman established its need for the continuation of this service (J.S. 38), and the Commission certificated each of the independent motor carriers to continue to perform it at the new location (J.S. 31-45).

Two additional motor carrier applicants for authority to serve the new plant were wholly owned railroad subsidies—Rock Island Motor Transit Company ("Transit"), a subsidiary of the Chicago and Rock Island Railroad, and New York Central Transport ("Transport"), a subsidiary of the New York Central Railroad. Transit had, pursuant to Commission authorization, served the old Eastman plant on outbound traffic to points in a number of States (see *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419), and the Commission found that Eastman needed Transit's service (J.S. 38), particularly its less-than-truckload "peddle service."[4]

As in previous cases involving applications for motor operating authority by a rail subsidiary, the Commis-

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transportation for a railroad within a railroad terminal area shall be regulated under the provisions—such as those involving reasonable rates and tariff requirements—that are applicable to railroads.

[4] "Peddle service" refers to "starting with a full load and delivering at various destination points, or the converse, picking up parts of a load at various points and delivering at a single destination." *American Trucking Assns.* v. *United States*, 355 U.S. 141, 148, n. 9.

sion required Transit to show "special circumstances" justifying railroad entry into the motor carrier field (J.S. 36). Transit established that: (1) no independent motor common carrier opposed Transit's application; (2) no evidence was introduced that competing motor carriers were able or willing to serve the points Transit was authorized to serve (J.S. 37-38); (3) no new service would be authorized; rather, the former service would be continued; and (4) the continued service would be but a slight extension of that service (J.S. 38). On the basis of this showing the Commission certificated Motor Transit to serve Oakbrook as an off-route point in connection with its existing authorized regular route operations (J.S. 41-42).

The other subsidiary, Transport, proposed to serve Eastman from the railhead at Chicago to the Oakbrook plant after a rail movement from Eastman's Rochester, New York plant (J.S. 33, 39). Oakbrook is described in a tariff of the New York Central Railroad as within that railroad's Chicago terminal area. Since the proposed operation was thus motor service within a terminal area incidental to rail transportation, which is regulated under Part I, and exempted from Part II, of the Interstate Commerce Act (49 U.S.C. 302(c)(2)), the Commission denied Transport's application for authority under Part II as unnecessary.

The district court sustained the Commission's order (J.S. 23-30), holding that "the Commission correctly concluded that special circumstances exist which amply justified the grant of Motor Transit's applica-

tion" (J.S. 29), and that "the Commission was correct in concluding that Transport did not need a certificate for its operations between Chicago and Oakbrook" (J.S. 30). The district court also indicated its view that appellant lacked standing (see p. 2, n. 1, *supra*), but did not rest decision on this point (J.S. 24, n. 2).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court.

1. Rock Island Motor Transit was properly granted a certificate on the same evidence of shipper need for service that supported grants of certificates to the independent motor carriers, coupled with the further showing of special circumstances. Section 5(2)(b) of the Interstate Commerce Act [5] confines acquisitions

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[5] Section 5(2)(b), 49 U.S.C. 5(2)(b), provides in pertinent part as follows:-

> * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to

of motor carriers by railroads to service that is auxiliary or supplemental to train service (*United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 434), and the Commission is guided by the policy underlying this restriction in considering applications by rail-affiliated motor carriers for certificates of public convenience and necessity (*American Trucking Assns.* v. *United States*, 355 U.S. 141, 149-150). However, the Commission may depart from the criteria of § 5(2)(b) in particular proceedings under Section 207 "where 'special circumstances' prevail, namely, where unrestricted operations by the rail-owned carrier are found on specific facts and circumstances to be in the public interest." *Ibid.* In determining whether such special circumstances exist, the Commission has a broad discretion (*American Trucking Assns.* v. *United States*, 364 U.S. 1, 16), which was not abused here.

(1) There was no suggestion in the proceedings that competition might be unduly restrained within the sense of § 5(2)(b) if the certificate were issued. Indeed, Transit's application was not opposed by the twenty-eight independent motor carriers serving the shipper.[6] Nor was there any indication that any of them were willing or able to take on the additional burden of replacing Transit's service.

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use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

[6] The two independent motor carriers who initially challenged its application subsequently withdrew their opposition.

(2) The shipper testified to its need and desire for the services of all of these carriers, including the less-than-truckload service provided by Transit. In fact, Eastman singled out its need for Transit's less-than-truckload service (Exh. 3, pp. 5, 6, 7, Appendix).

(3) Transit was not seeking authority to provide a new service to a shipper. It had provided identical service to Eastman at its Chicago plant until the facility was moved to Oakbrook and sought merely to continue this service. Thus, Transit's proposed service will not "inject a new quantum of competition" (J.S. 37). See, *e. g.*, *Pennsylvania Truck Lines, Inc. v. United States*, 219 F. Supp. 871 (W.D. Pa.).

(4) Since Eastman's plant has been moved only 2½ miles outside the Chicago commercial zone, in which Transit is presently authorized to conduct unrestricted operations, the extension authorized by the instant certificate is *de minimis*—constituting, as the Commission observed, "but a slight extension" of Transit's prior authority in the same geographical area (J.S. 38).

2. The Commission correctly found that Transport needs no authority under Part II to move motor trailers from Chicago to Oakbrook. Transport has expressly stipulated that it has no intention of handling "traffic which has not had a prior, or will not have a subsequent, rail movement" (J.S. 46), and its proposed operations are clearly within the New York Central's terminal area as defined in its tariffs. Under Section 202(c)(2) of the Act, 49 U.S.C. 302(c)(2), Transport's operation is therefore exempt from

Part II and subject to Part I, as service within a terminal area incidental to rail transportation.

Appellant presented no evidence to show that the New York Central Railroad has exceeded a reasonable terminal area around Chicago by including Oakbrook. But, at all events, appellant's contention in this regard is not foreclosed. It may, as the lower court suggested, file a complaint against the New York Central with the Commission (J.S. 29-30); or it may seek to initiate a rulemaking proceeding to define the terminal area (see J.S. 19; 49 C.F.R. § 1.44). And certainly the mere possibility of future abuse by this or other railroads (see J.S. 17-18) provides no basis for limiting the present terminal area. See *United States* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 294 U.S. 499, 507.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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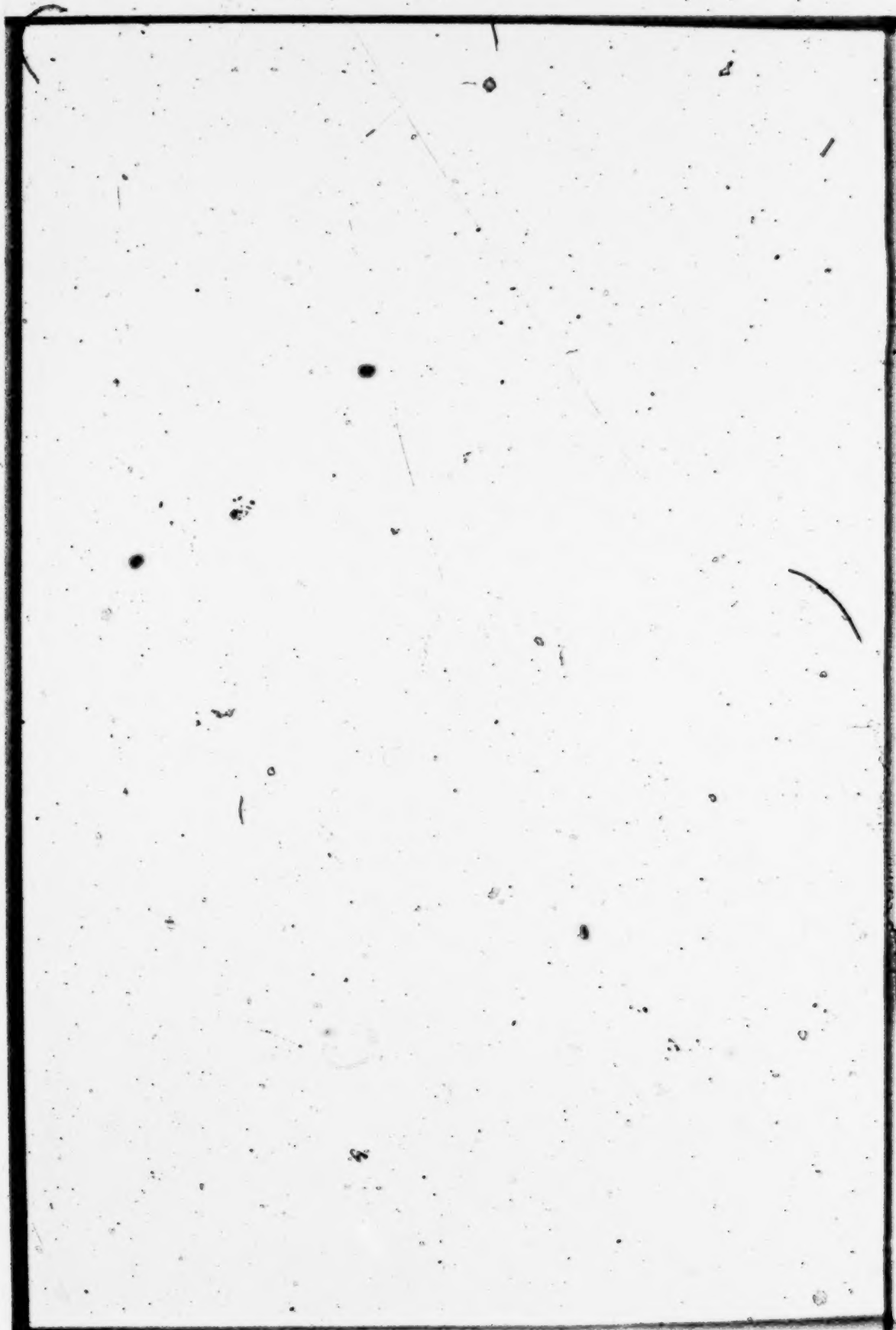

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No. 1046

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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APPELLANT'S REPLY BRIEF

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On Appeal from the United States District Court for the District of Columbia

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APPELLANT'S REPLY BRIEF

I

The Right To Challenge Our Standing To Sue Has Been Waived

The joint brief of the United States and the Interstate Commerce Commission[1] raises the issue of appellant's standing to sue. At the same time, it states incorrectly (p. 5), that the lower court "indicated its view that appellant lacked standing . . . but did not rest decision on this point . . ." As a matter of fact, the lower court,

[1] Hereinafter sometimes referred to as "government."

albeit begrudgingly, held that the question of appellant's standing to sue was not open, since this Court had ruled that it had such standing in *American Trucking Assns.* v. *United States*, 355 U.S. 141, 144 (1957). (Jurisdictional Statement 24, n. 2.) We submit it would have been more straightforward for the Government to admit that the lower court squarely held against it on this issue, and then to have criticized such holding, if it chose to do so. The issue was raised extremely belatedly by the Commission before the court below. It was not raised there at all by either of the intervening rail-subsidiary defendants. They have raised it initially in this Court in their motions to dismiss or affirm.

The complaint in this case was filed in the court below on April 8, 1964. Intervening rail-subsidiary defendants promptly answered, neither of them raising the issue of our standing to bring this action. The Commission, by orders of the District Court, obtained extentions of time within which to answer, until June 29, 1964. By order served June 25, 1964, the Commission, on its own motion, reopened its docket for reconsideration on the basis of the record already made. On June 26, 1964, the court below, at the request of the Commission, entered an order postponing all further proceedings. By report and order dated June 25, 1965, the Commission, division 1, on further consideration, took the action now before this Court for review.

Appellant, for the second time, exhausted its administrative remedies before the Commission and filed supplement to its original complaint December 13, 1965 (J. S. 5, 6). After extensions of time secured on behalf of the United States and/or the Commission, the latter finally filed its answer on April 12, 1966, more than two years after the filing of our complaint.[2] Even then, no challenge

[2] The United States filed answer April 13, 1966, in which it stated that it "neither admits nor denies the allegations [of the complaint]. The United States of America neither supports nor opposes the order of the Commission."

was raised to our standing to sue. Not until it filed its brief on the merits in the District Court, on July 14, 1966, did the Commission, for the first time, raise the issue of standing. We submit that it raised it much too late.

Rule 12(h) of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 12(h), provides that "A party waives all defenses and objections which he does not present either by motion . . . or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading . . ., and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Since the Commission failed to raise the affirmative defense of standing to sue by motion or in its answer to our complaint and amended complaint, and since there can be no disputing that the court below had jurisdiction over the subject matter of this suit, it is clear that the government has now waived the point.

This reading of Rule 12(h) is also in harmony with Rule 17(a), 28 U.S.C. Rule 17(a). That rule provides that "Every action shall be prosecuted in the name of the real party in interest . . . ." And the courts have held that the objection that the plaintiff is not the real party in interest must be made with "reasonable promptness" and may be waived by delay. *E. Brooke Matlack, Inc.* v. *Walrath*, 24 F.R.D. 263; Barron and Holtzhoff, *Federal Practice and Procedure*, § 382; *Moore's Federal Practice*, § 17.01. See *Fox* v. *McGrath*, 152 F. 2d 616; *Clark* v. *Chase Nat. Bank of City of New York*, 45 F. Supp. 820. Plainly, the government has been anything but prompt in challenging our standing to bring this suit. We

submit, therefore, that their procedural maneuver should be disallowed and the case decided on its merits.

Even if the above rules did not exist, as such, the government should not be allowed, at this time, to question our standing to sue, since it would be inequitable to permit it to do so. We filed our complaint over two years ago. The Commission should have raised its defense by a motion to dismiss at that time. This it failed to do; instead, it reopened the proceedings, not at our request but on its own motion, for further consideration, which required us to file further pleadings with the Commission and the lower court and to incur additional expenses. Now the government asks this Court, after all this time, to deprive us of our right to challenge the validity of the Commission's action. We submit that the principles of equity and fair play represent still another reason why the Court should disregard the government's argument at this late date.

II

Appellant Has Standing To Maintain This Action In Any Event

In addition to the fact that the government has waited much too long to urge that appellant has no standing to maintain this suit, its contention should not be upheld on the merits. Referring to this Court's *per curiam* order denying rehearing in the *NMFTA* case,[3] the government (p. 2, n. 1) argues that NMFTA[4] had an "independent statutory function in the scheme of the Interstate Commerce Act" which "appellant here" does not have. To the contrary, we submit that ATA meets the government's

[3] *National Motor Freight Traffic Assn.* v. *United States*, 372 U.S. 246.

[4] Which it misdescribes as a rate bureau. NMFTA is not a rate bureau at all, although rate bureaus were also involved as plaintiffs in the cited case.

designation at least as well, if not better, than NMFTA. As noted in the district court decision in the *NMFTA* case, 205 F. Supp. 592, 593 (1962), the plaintiffs therein were "all motor carrier associations whose members are individual carriers engaged in interstate commerce . . . ." Here, appellant is, as noted in the attached affidavit[5] of William A. Bresnahan, its Managing Director, a federation of affiliated state trucking associations, whose membership is "composed of those engaged in the transportation of freight, express or mail by highway vehicles . . . each member exercising the right of franchise in this corporation through such affiliated association in the manner determined by such association for the election of its Directors to American Trucking Associations, Inc." (Affidavit, p. 29).[6]

This Court held that individual member carriers of NMFTA and the rate bureaus were aggrieved by the Commission's order there. The motor carrier members of appellant are equally aggrieved at the cavalier treatment by the Commission of the important Congressional policy here involved. The fact is that, generally speaking, the same motor carriers which are members of NMFTA and rate bureaus, and which furnish the financial support which enables those organizations to function are also members of ATA, and provide its financial support. As the affidavit, p. 29, makes clear, there are, contrary to the claim at page 2 of the government's brief, motor carrier members of ATA, albeit such membership is achieved through membership in one of its affiliated state associations.

As noted in the affidavit, ATA is the owner of the National Motor Freight Classification, which is published

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[5] We filed a similar affidavit in the court below.

[6] Motor Transit, which, in its answer in the court below, specifically stated that it was a member of appellant has now, rather belatedly, discovered that it is not such a member after all (Br., p. 12).

by NMFTA as agent for the participating carriers. ATA, under its contract with NMFTA, prints, distributes and sells the Classification; and could, on specified notice, resume publication thereof as agent for the participating carriers. In addition, ATA owns and publishes the Motor Carriers' Explosives and Dangerous Articles Tariff, on behalf of almost 4,000 motor carrier participants, as required by the Interstate Commerce Commission. *Infra*, 30-31.

The affidavit demonstrates that ATA's representation of the independent motor carriers comprising the organized trucking industry is on a significantly broader basis than NMFTA's. It should be clear that if NMFTA is—as stated by this Court—a "proper representative[s] of the interests of [its] members,"[7] then *a fortiori*, the same thing is true of ATA. We submit that this Court, as shown by its order in *NMFTA*, is, in cases involving decisions of agencies such as the Interstate Commerce Commission, more interested in the proper interpretation and application of the law than in the precise status of the adversary parties. While such proceedings involve private rights, they often, as here, also involve public policies, the importance of which far transcends that of the decision to the litigants before the Commission. Surely the Commission should not be allowed to ignore the important Congressional policy involved here whenever motor carriers do not choose, for whatever reason, to insist that the Commission abide by it. This important public policy, when properly enforced, may incidentally benefit an independent motor carrier or carriers, but it is not something to be turned on or off, like a spigot, depending upon whether such carriers, in specific cases, choose to protest applications for authority by railroads or their affiliates. Indeed, even if ATA had not been a party to the proceeding before the Commission, and no independent motor carrier had protested the applications of the rail subsidi-

[7] *NMFTA* case, *supra*, 372 U.S. at 247.

aries, it was still the obligation of the Commission, which it ignored, to rigidly enforce the Congressional policy against allowing unrestricted grants of operating authority to railroads and their affiliates.

The *Associated Industries* case[8] clearly supports the right of ATA to bring this action. There, "a New York membership corporation, the members of which are New York industrial and commercial firms and corporations, many of which are substantial consumers of coal"[9] filed a petition to review orders of the Bituminous Coal Commission of the Department of Interior. Section 6(b) of the Bituminous Coal Act of 1937 authorized "any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party" to seek review by a petition in an appropriate United States Circuit Court of Appeals.[10] Respondents filed a motion to dismiss the petition,[11] which was "not based on any contention as to the general non-reviewability of the orders or their validity, but solely on the contention that, assuming them to be invalid and reviewable, petitioner is not the kind of person entitled to seek court review."[12] There, as here, the agency argued that plaintiff "is not a 'person aggrieved' by the orders."[13] In the course of a thoroughly detailed opinion, the court said (at 712-713):

> It is urged by respondents that, even if a consumer is a "person aggrieved," nevertheless the petition

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[8] *Associated Industries of New York State, Inc.* v. *Ickes, et al.*, 134 F. 2d 694 (2d Cir. 1943), cited by the government (p. 2).

[9] *Id.*, at 697.

[10] *Id.*, at 699.

[11] *Ibid.* It will be noted that, unlike the situation here, respondents, at the outset, filed their motion to dismiss. As already noted, this is the course which should have been followed by the Commission in this case.

[12] *Ibid.*

[13] *Ibid.*

> should be dismissed because there is nothing in the record below, and only a bare allegation in the petition here, showing that petitioner is itself a consumer. But petitioner is a membership corporation "formed for the promotion of the welfare of its members"; and respondents concede in their brief that, for the purpose of this motion, petitioner's membership consists of 1,356 persons, firms and corporations, including many who "purchase and consume substantial quantities (estimated at 15,000,000 tons for the year 1942) of bituminous coal produced in Minimum Price Area 1 * * * and which is shipped for sale and sold in Market Areas 2 and 4"; and (again for purposes of this motion) respondents concede that those members may well be affected by the respondents' orders which increase the minimum prices at which coal can be sold by code member producers in an area in which those of petitioner's members who are coal purchasers transact their business. Respondents, as already noted, permitted petitioner to become a party to proceedings before them on the basis that petitioner did represent consumers, and with evidence in the record of petitioner's membership; and respondents, in those proceedings referred to petitioner as a representative of consumers. We take that as an administrative finding by respondents that petitioner is vested with sufficient authority to represent its consumer members. Consequently, we do not regard as in point cases suggesting that, ordinarily, there may be doubt whether a membership organization can be permitted to sue on behalf of its members, absent specific authority to do so. (Footnotes omitted)

Just as the industry association in the cited case was, as noted by the court, "formed for the promotion of the welfare of its members," ATA, the industry association here involved, was formed for "the mutual improvement and advancement of the interests of those engaged in [the trucking] industry throughout the limits of the

United States." [14] Here, the members of ATA have as much interest, and "may well be, [as] affected by the [Commission's] orders" as were the industry members of the association plaintiff in the cited case. In short, the same reasons which supported the standing of the association to bring the complaint involved in *Associated Industries* [15] support ATA's standing to bring this action here.

Also supporting the right of appellant to maintain this suit is *National Coal Ass'n.* v. *Federal Power Commission*, 191 F. 2d 462 (D.C. Cir. 1951). There the Court of Appeals for the District of Columbia held that "a trade association of bituminous coal mine owners and operators," . . . "the United Mine Workers of America, a labor union of coal miners," . . . and "the Railway Labor Executives Association, whose membership is composed of the chief executive officers of twenty-one of the so-called standard railroad labor unions" had standing to maintain an action to set aside an FPC order granting a certificate of public convenience and necessity under § 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e), to construct and operate a natural gas pipeline. The court, referring to the *Associated Industries* decision, noted:

> It is unnecessary for us to undertake a reexamination at this time of what has already been done so well by Judge Frank in his comprehensive discussion of the considerable body of case law which has developed with regard to the problem of standing to challenge administrative orders. (191 F. 2d, at 464)

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[14] Affidavit, p. 30.

[15] Petition for a writ of certiorari was granted, 319 U.S. 739, but upon the suggestion of both parties to the suit that "the cause has become moot by reason of the expiration" of the Bituminous Coal Act, the Supreme Court vacated the order of the Circuit Court of Appeals and remanded the cause to that court "for such further proceedings as may be appropriate." 320 U.S. 707. This procedural action, however, in no way detracts from the validity of the reasoning of the appellate court in the *Associated Industries* case.

The dissenting opinion in the *National Coal* case points up the extent to which the majority went in allowing the maintenance of the action:

> It is to be especially noted that neither the National Coal Association nor the United Mine Workers of America alleged, nor was any effort made to prove, that a single miner or a single mine owner belonging to either of these associations would be in any way affected by the construction of this pipe line. They content themselves with allegations and proof that they do in fact represent among their members a high percentage of miners and mine owners. These parties have no standing whatever in court. (*Id.*, at 468)

Another case in which the Court of Appeals for the District of Columbia Circuit recognized the right of an association to sue in a representative capacity for its members is *MacArthur Liquors, Inc.* v. *The Palisades Citizens Ass'n, Inc.*, 265 F. 2d 372, 374 (1959), where the court found that the individual members of that association had sufficient interest to sue and that, therefore, "the association has standing to protect their interests."

Still another case which strongly supports appellant's standing to bring the instant suit is *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958). This Court held there that, even where an association asserted the personal constitutional rights of its members, and despite the doctrine that constitutional adjudication should where possible be avoided, the association was:

> the appropriate party to assert these rights, because it and its members are in every practical sense identical. The association, which provides in its constitution that "any person who is in accordance with its principles and policies * * *" may become a member is but the medium through which its individual members seek to make more effective the expression of their own views. (357 U.S. at 459).

If the N.A.A.C.P. has standing in court to assert the constitutional rights of its members, then we submit appellant has a right to assert in this Court, as it did before the Commission, the statutory rights of the regulated motor carriers it represents.

To quote Mr. Justice Jackson in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951):

> The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.

Section 220(a) of the Interstate Commerce Act, 49 U.S.C. 320(a), authorizes the Commission "to require annual, periodical, or special reports from all motor carriers, brokers, lessors and associations . . . ." Section 220(d), 49 U.S.C. 320(d), authorizes the Commission to "inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, brokers, lessors and associations. . . ." Section 220(e), 49 U.S.C. 320(e), defines "association" as an "association or organization maintained by or in the interest of any group of motor carriers or brokers subject to this part which performs any service, or engages in any activities in connection with any traffic, transportation, or facilities subject to this Act." The power to require associations to file reports and to inspect and copy their accounts, books, etc., was specifically requested by the Interstate Commerce Commission, and accomplished by amendment of § 220 in 1949, 63 Stat. 487. In a letter addressed to the Chairman of the Senate Committee on Interstate and Foreign Commerce, the Commission's Legislative Committee discussed the proposal (U.S. Cong. Serv. 1949, 1645):

> The associations or organizations of this kind are numerous. Among the ones best known are the As-

> sociation of American Railroads, the American Trucking Associations, Inc., and Freight Forwarders Institute. They include rate bureaus and similar organizations. Such associations are not at present subject to the provisions of the Interstate Commerce Act which authorizes us to require the filing of reports by common carriers and others. Manifestly, they occupy positions of public importance with respect to transportation and its regulation, and we believe that they might well be required to file reports.[16]

We submit that there is something incongruous in the Commission, on the one hand, telling the Congress that appellant, "manifestly [occupies a position] of public importance with respect to transportation and its regulation," and, on the other, telling this Court that appellant has no standing to vindicate its "manifest position of public importance" by maintaining the action here involved.

In responding to other contentions raised in appellees' motions to affirm we shall, for simplicity, clarity and convenience, separate them under the headings "Motor Transit" and "Transport Company," respectively.

III

Motor Transit

The Government's brief avers (p. 3), citing page 38 of our Jurisdictional Statement, that the Commission "found that Eastman needed Transit's service, particularly its less-than-truckload 'peddle service,'" and (n. 4) cites the

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[16] The Commission has used the power conferred by the amendment to § 220. By order of January 12, 1950, it directed plaintiff herein (as well as others) to file an "Association Special Report." This order was complied with by plaintiff by the filing with the Commission of the special report required, dated April 27, 1950.

description of "peddle service" contained in this Court's *Rock Island* opinion, 355 U.S. 141, 148, n. 9.[17]

It should be noted that the citation supplied by the Government's brief in no way supports the statement that the Commission found that Eastman "particularly [needed]" Motor Transit's "less-than-truckload 'peddle service' ". Indeed, nowhere else in the record can we find any evidence even remotely supporting the Government's statement.[18] We can only assume, reluctantly, that the misstatement is an attempt to shore up the Commission's completely unwarranted grant of unrestricted motor rights to the rail subsidiary, by making the unfounded assumption that what is involved (insofar as this carrier is concerned) is the same type of service which this Court found in *Rock Island* was not being performed by the independent motor carriers there, which in turn led this Court to uphold the Commission's action. If that were the fact—which it is not—this Court might be justified in holding that the independent motor carriers cannot or will not provide the service which the Commission allowed the rail subsidiary, Motor Transit, to perform here, a holding which the Commission itself never made.

Again, the government brief severely strains credulity with the bald statement (p. 7) that ". . . Eastman singled out its need for Transit's less-than-truckload service." The citation supplied by the government for this exag-

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[17] We use the same case nomenclature as in our Jurisdictional Statement p. 8, n. 6.

[18] In its report under review the division noted that the rail subsidiary had served Eastman's Chicago plant "as a distribution carrier on outbound traffic in an area Motor Transit serves under certain functionally unrestricted motor carrier authority." The division then noted Motor Transit "desire[s] to continue to serve Eastman at its new facilities at Oakbrook in the same manner that [it had] been serving it at Chicago." (J.S. 33). This—it hardly needs saying—doesn't at all fit the government's restricted description of Motor Transit's proposed operations as "less-than-truckload peddle service."

gerated statement is pages 5, 6, and 7 of Exhibit 3 of the record before the Commission, and the appendix thereto. This refers to the "canned testimony" of James R. Roney, Divisional Traffic Manager at Eastman's Midwestern Sales Division. Throughout his entire statement (7 pages), Mr. Roney never once "singled out" Motor Transit, either by name or by reference exact enough to assume that he was specifically referring to it, as distinguished from any of the twenty-eight independent motor carriers whose applications to serve Eastman were heard at the same time. At the end of Witness Roney's statement, he noted that Eastman supports "the applications of those carriers which are now regularly serving our Midwestern Sales Division, a list of which is attached hereto, Appendix A." That appendix contains a list of twenty-seven carriers [19] whose applications witness Roney stated Eastman was supporting and it does contain Motor Transit's name. This, we submit, affords about the flimsiest foundation imaginable upon which to support the government's absurd claim that "Eastman singled out its need for Transit's less-than-truckload service."

These instances in which the government finds its necessary, first, to misstate the nature of the service proposed by Motor Transit, and then, to grossly overstate Eastman's claimed need for its service,[20] demonstrate—better than anything we might say—the invalidity of the Commission's grant of authority to the rail subsidiary. Had there been even a scintilla of evidence in the record before the Commission to support a finding that the independent motor carriers were unable or unwilling to pro-

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[19] Twenty-one typed names, plus six written in.

[20] As previously noted (J.S. 10, n. 9) Eastman did not even bother to file exceptions to the Examiner's report denying Motor Transit's application. Eastman's failure to act—even at that early stage of the proceedings—to aid Motor Transit's efforts to secure operating authority, hardly comports—despite the Government's labored efforts to show the contrary—with the idea that it was in any real need of Motor Transit's proposed service.

vide the service which Motor Transit proposed, it would not have been necessary for the government to have substituted for the evidence of record—or lack thereof—its extremely strained interpretations referred to.

Motor Transit's brief (pp. 7-9) attempts to find "special circumstances" in the extremely general testimony of an Eastman witness regarding the truck service needed by his company. Here again, there is nothing in the witness' quoted language (p. 8) which remotely suggests that Motor Transit's service—as opposed to that of any independent motor carrier operating in the same territory—is vitally needed. Motor Transit's brief attempts to bridge this gap by the flat statement (p. 7) that the "service [of independent motor carriers] is inadequate in the instant proceeding" because "the testimony of Eastman witnesses at the hearing [indicates] that the shipper needed the continued transportation services of the motor carriers which had been serving it at its Chicago plant, including Motor Transit." Motor Transit's claim is nothing more than an exercise in semantics. Any fair reading of the record here will show that the only "need" claimed by Eastman for Motor Transit's service was that Motor Transit had provided service for Eastman at its old plant in Chicago.

Motor Transit's brief quotes generously (p. 9) from the Commission's opinion in *Burlington Truck Lines, Inc. —Purchase—Pirnie*, 85 M.C.C. 363 (1960), in an attempt to support its decision here. We respectfully submit that all that *Pirnie* really proves is that the Commission is quite willing to ignore the Congressional policy against rail intrusion into the motor-carrier field, unless such carriers or their representatives oppose such efforts every step of the way.[21]

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[21] If nothing more, this demonstrates the wisdom of upholding our standing to sue here. Appellant has no reason to be concerned

Both the government and Motor Transit obviously recognize the infirmity of the Commission's action—that the unwillingness or inability of independent motor carriers to provide a needed service found to exist in *Rock Island* —is not present here. Each of them, therefore, suggests that other "special circumstances" justify the Commission's action. We answer, *seriatim*, the arguments made in the government brief (pp. 6-7), which includes all the points made in that of Motor Transit:

(1) *Motor Transit's application was not opposed by the twenty-eight independent motor carriers, and there was no indication that any of them were willing or able to take on the additional burden of replacing Transit's service.*[22]

As noted in our Jurisdictional Statement (pp. 12-13), this argument simply attempts to transfer the burden of proof from the shoulders of the rail-subsidiary applicant, where it belongs, to those of the independent motor carriers. It was Motor Transit's obligation to prove that "special circumstances" *do* exist; not that of the independent motor carriers or this appellant to show that they *don't*.

The attempt to make much of the fact that the independent motor carriers in this proceeding did not oppose the applications of the railroad subsidiaries—and the effort to substitute their inaction for a positive finding by the Commission of inadequacy of their service—shows a remarkable degree of naivete, and deserves comment. Here Eastman, the supporting shipper, controls the traffic and, *alone*, determines which motor carriers will share in it.

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over incurring the ill will of large shippers, such as Eastman Kodak here. As we point out, *infra*, independent motor carriers often do.

[22] For ease of separating the government's, and our argument, theirs is italicized.

It is, therefore, hardly as amazing as appellees would apparently have the Court believe that the independent motor-carrier applicants, which expected to share Eastman's traffic, did not oppose the applications of the rail-affiliate motor carriers and thus challenge Eastman's aim of receiving service at its Oakbrook plant from the same carriers which served its Chicago plant. In a recent case, *Riss & Co., Inc., Ext.—Dakota County, Nebr.*, 102 M.C.C. 336 (1966), the Commission, division 1, said:

> Here . . . the shipper support has been meaningless because the chief supporting shipper, Iowa Beef, used its promised support of individual carriers as a means of forcing withdrawal of protests between competing applicants, apparently in the hope of expediting these proceedings. *We are aware that Iowa Beef is not unique in resorting to this device, and this Commission has frequently stated that it is unwilling to rely entirely upon the shipper support in measuring public need.* Here, however, reliance upon the shipper support to force withdrawal of protests is completely transparent and the shipper support contains no other persuasive elements to explain the support of certain carriers and not of others. (Emphasis supplied.)

The Commission's report (J.S. 41) states that we assert, without record support, that "certain motor carriers do not oppose the present applications because of undisclosed pressures brought upon them by either applicants or their supporting shipper." The fact is that we have not been that blunt. What we attempted to do is indicate, as we have above, the subtle pressure which is always upon any motor-carrier applicant seeking the privilege of transporting the traffic of a large shipper such as Eastman not to take any action likely to displease that shipper. Whether that pressure is direct and "completely transparent," as in the cited *Riss* case, or indirect and of more subtle nature makes little difference. In either event

it is real, and it is there. And we submit that when, as here, the Commission finds that the mere absence of opposition by independent motor carriers to applications filed by rail subsidiaries—under the circumstances present here—justifies ignoring important Congressional policy, it is a sorry day indeed!

(2) *The shipper testified to a need for the service of all carrier applicants, including that of Motor Transit, and singled out its need for Transit's service.*

We have shown above that the claimed singling out by Eastman of a need for Motor Transit's service is a figment of the government's imagination, rather than a fact of record. And we noted in our Jurisdictional Statement (p. 10) that the desire of a large shipper for the services of a railroad's motor affiliate was held by this Court in *Pacific Motor*[23] to offer insufficient reason to breach the Congressional policy involved.

(3) *Motor Transit simply sought to provide Eastman with the same service at its Oakbrook plant as it had provided at the Chicago plant, and its proposed service "will not inject a new quantum of competition."*

If the reference to competition is intended to meet one of the criteria of the proviso of § 5(2)(b) of the Act (J. S. 78), i.e., that the Commission—before granting motor rights to a rail affiliate—must find that its action "will not unduly restrain competition," it should be enough to point out that the Commission could not meet the dominant requirement of the proviso here. In short, its grant of unrestricted authority to the rail subsidiary did not meet the proviso's requirement that its award "will enable [Motor Transit's rail parent] to use service by motor vehicle to public advantage in its [rail] operations."

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[23] *American Trucking Assns.* v. *United States*, 364 U.S. 1.

(4) *Only a "slight extension" of Motor Transit's existing authority is involved.*

This *de minimis* doctrine—to use the Government's designation—would, if approved, substantially defeat the Congressional policy here involved. Nowhere in the provisions of the statute which it administers is the Commission empowered to lower the bars against rail entry into the truck field merely because the authority sought is limited in distance. This new Government *de minimis* doctrine, if followed, would, to use the vernacular, result in the policy of the Act being "nibbled to death by a duck."

To sum up: If the Commission's grant of authority to Motor Transit is upheld, the "special circumstances" doctrine will have been reduced to a mere catch phrase. Any reason which the Commission can pry from the record before it can serve as an excuse to defeat the Congressional policy. Here, as in *Pacific Motor*, there was no finding by the Commission "that independent [motor] carriers were unable or unwilling to perform the same type of service as [the rail subsidiary]."[24] Recognizing this fatal flaw, appellees attempt to persuade this Court that almost any reason the Commission can "dig up"—including one which is based on an improper assignment of the burden of proof—should be sufficient to justify waiver of the policy of the Act here involved. Approval of this reasoning will be the surest way to consign the policy to limbo, and "open the door to approval of over-the-road . . . trucking by railroad subsidiaries . . . and . . . greatly attenuate the safeguards which have been painstakingly erected to prevent railroad domination of trucking."[25] To again quote *Pacific Motor*,[26] if the "safe-

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[24] 364 U.S., at 14-15.

[25] *Id.*, 15.

[26] *Ibid.*

guards are no longer needed . . . the pardoning power . . . belongs to Congress," not the Commission.

IV

Transport Company

Here again, the Government's brief strains to reach unjustified assumptions. Simply because the application filed by this rail subsidiary requested authority restricted "against the handling of traffic which has not had a prior, or will not have a subsequent, rail movement" the Government dignifies this as an "express stipulation" (p. 7). It doesn't explain what happened to this "stipulation" when the Commission, in effect, handed the paper in which it was contained back to the rail subsidiary, saying that it could already perform the service sought without any motor authority.

In our Jurisdictional Statement (pp. 13-21), we pointed out that the statute involved in no way justifies the favored treatment accorded the railroads, which are allowed to publish any terminal area they please, while motor carriers are restricted in their operations within such areas in every city, town and hamlet in the country. And we argued that the disparate treatment of these two transport modes could not constitute the "fair and impartial regulation" required of the Commission by the National Transportation Policy. For obvious reasons, we submit, the government brief doesn't really meet our contentions head on. It states—as everyone already knows—that terminal area operations are exempt from regulation under Part II of the Act (pp. 7-8). But it doesn't even attempt an answer to the $64,000 question: How can the Commission justify its highly favored treatment of the railroads in allowing them to prescribe their own terminal areas at the same time it strictly prescribes them for motor carriers? It sidesteps our contentions respecting

the gross favoritism shown the railroads by the statement that we have not been "foreclosed." We are told that we may challenge the terminal area prescribed for itself by the New York Central Railroad by a complaint before the Commission. (p. 8)

It should be obvious that the "relief" held out to us by the government is a snare and delusion. So long as railroads are allowed to name their own terminal areas, they have the immediate right to serve any new plant producing traffic they desire to haul by the simple expedient of including the point at which the plant is located—whether on their lines or not—within the "terminal area" of a point they serve. A motor carrier, on the other hand, which is not already certificated to serve the point at which the plant is located has to go through the time-consuming and expensive rigmarole of applying to the Commission for authority to serve it, which he may not even then acquire, depending on the quantum of service already available. Bearing in mind that there are literally thousands of points which railroads can include in their self-prescribed terminal areas, the "right" to complain to the Commission in individual cases—and assume the burden of proof—that a railroad has exceeded a reasonable "terminal area" in a tariff publication is an illusory one indeed.

Not long ago, the Commission dealt with a situation in which Railway Express Agency, a railroad subsidiary, by tariff publication, listed the Army's Tooele Ordnance Depot as a point within its Salt Lake City "terminal area," 36 miles away. Despite the distance involved and the fact that a "wide expanse of undeveloped wasteland separates the ordnance depot from Salt Lake City,"[27] the rail subsidiary enjoyed the privilege of serving the govern-

[27] *Barton Truck Line, Inc.* v. *Railway Express Agency*, 95 M.C.C. 625, 630 (Aug. 5, 1965).

ment plant for over two years,[28] while independent motor carriers not specifically authorized to serve the depot could not compete. To be sure, the Commission ultimately concluded that REA could not legally serve the depot, but in the interim period, as noted, REA continued to enjoy the traffic.

The question of whether REA should be confined to the same terminal areas as have been prescribed by the Commission for motor carriers and freight forwarders is now before the Commission in Ex Parte No. 242, *Express Company Terminal Areas.* In fact, the report of its hearing examiner, served August 25, 1965, recommends that REA's terminal area limits be so prescribed, and the matter is pending on exceptions and oral argument. In this connection, we note that another panacea offered in the government's brief for the problems resulting from the favored treatment accorded the railroads is the suggestion (p. 8) that we "may seek to initiate a rulemaking proceeding to define the terminal area," presumably that of railroads generally. We have recently done precisely that. In Ex Parte No. 242, cited above, this appellant, on May 15, 1964, filed a petition with the Commission to broaden the scope of the proceeding "to include consideration of the terminal areas of all carriers subject to Parts I and III of the Act," as well as that of REA. By order served July 21, 1964, the Commission denied our petition. The reasons set forth in the denial order was that the relief sought "would cause undue delay in the handling of the instant proceeding and otherwise is not warranted at this time." With all due respect, considering that Ex Parte No. 242 originated with a Commission order served April 13, 1964, and now, three years later, is still pending

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[28] We say "over two years" because the complaint of the independent motor carrier there involved was filed July 22, 1963 (*Id.*, 625). The Commission's report does not indicate how long before that date REA had been conducting the operations under its self-prescribed "terminal area" tariff.

on exceptions to the hearing examiner's report, we hardly see how including the question of defining rail and water carrier terminal areas would have resulted in much more delay than has already occurred. And what would be a more propitious time to undertake a proceeding looking toward meeting the pertinent standard of the National Transportation Policy?

In our Jurisdictional Statement (p. 15), we contended that if the service provided by Transport Company is, in effect, that of its rail parent, the latter should have to meet the certificate requirements of § 1(18) of the Act. The government's brief contains no response to this argument. That of Transport Company cites four cases which it contends demonstrate that we are not on sound ground. We refer to them briefly.

With respect to *New York Dock Ry.* v. *Pennsylvania R.R.*,[29] it should be enough to point out that the situation was the opposite of that here. There, as the appellate court noted,[30] the railroad involved "does not intend to invade new territory by extending its line of tracks . . . a foot beyond these present termini . . . but intends . . . to reach its patrons, present and prospective, within New York City—*territory which it now enters and which it now serves* . . ." (Our emphasis) Here, unlike the cited case, Transport Company's rail parent proposes to serve, through its subsidiary, patrons located at a point which it does not enter and does not serve, i.e., Oakbrook, Ill. In addition, and at least equally important, the case was decided at a time when the motor carriers were not subject to federal regulation, when there was no § 202(c) to rely on for the discrimination inherent in the Commission's decision here, and when there was no National Transpor-

[29] 62 F. 2d 1010 (1933). Cited at p. 7 of Transport Company's brief.

[30] *Id.*, at 1012.

tation Policy requiring fair and impartial regulation of railroads and motor carriers.

Transport Company's brief (p. 7) refers to the Commission's decision in *New York Central R. Co. Station at Jay Street Terminal*, 310 I.C.C. 211 (1960), as involving a similar situation to that here. We disagree. The proposed truck service there was to be performed, as noted in the appellate court's decision cited by Transport Company,[31] to a point served by the appellee railroad "for decades."[32] To again quote the court: "The service here proposed by the Central was designed at least in part, to enable it to reach the same part of Brooklyn formerly served in cooperation with the Jay St. Connecting Railroad."[33] So that there again the situation in the cited case was the opposite of that here.

In *Drayage And Unloading at Jefferson City, Mo.*,[34] cited in the excerpt from the *Jay Street Terminal* case quoted in Transport Company's brief (p. 7), the decision, as in the *New York Dock Ry.* case, was rendered prior to federal regulation of motor carriers. There a competing railroad, Missouri Pacific raised the issue of "whether it is unlawful for the M-K-T to publish rates to and from Jefferson City when its rails do not reach that point" (*Id.*, at 439). What is really pertinent in that decision is the following language (*Id.*, at 440):

> It is clear from the record that the corporate limits of Jefferson City do not include North Jefferson, and that the switching limits of North Jefferson do not embrace those of Jefferson City, or *vice versa*. Consequently, Jefferson City is not now, nor has it

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[31] *Long Island R.R. et al.* v. *New York Central R.R.*, 281 F. 2d 379 (1960).

[32] *Id.*, at 380.

[33] *Ibid.*

[34] 206 I.C.C. 436 (Feb. 2, 1935).

> ever been, a point on the rails of the M-K-T., and the service between that point and North Jefferson must be regarded as a road-haul service and not an accessorial terminal service.

Factually, the cited case seems to be on all fours with the situation here. And had the Commission applied the same standard here it would have held that the service involved was "road haul" and required certification before Transport Company could perform it.

To sum up: The Commission's decision is highly partial to railroads and their motor affiliates in their competitive battle with independent motor carriers. Its action is bereft of statutory support and violates its obligation, under the National Transportation Policy, to regulate these transport modes fairly and impartially. Only recently, the Commission has rejected an opportunity to equalize its treatment of these transportation antagonists.

As relief for the situation which results from the Commission's unequal treatment, the government says we are free to challenge—on a case by case basis—each and every rail tariff publication which, as here, allows its motor subsidiary to provide service within its self-prescribed "terminal area," service which is barred to independent motor carriers. In view of the relevant stricture of the National Transportation Policy, we submit that the government's position is legally untenable.

We seek only equality, not to overreach. We do not ask that railroads be limited to terminal areas smaller than those prescribed for motor carriers. It is only where the railroad's self-prescribed terminal area is beyond the area prescribed by the Commission for motor carriers that we have cause for complaint. To make it as clear as we can, we do not say that *any* use of trucks by railroads constitutes the extension of a line of railroad. We only say that where, as here, the Commission allows a railroad's motor subsidiary to perform operations to and

from a point it is not authorized to serve, and which its rail parent does not serve—on the basis that the truck service is an integrated part of its rail parent's line-haul service (J. S. 39)—it is only reasonable that the rail parent be required to conform to the requirements of § 1(18) of the Act. The Commission's decision here, which requires neither the rail parent, nor its motor affiliate, to obtain authority to serve the new location involved, certainly violates the certificate provisions of either § 1(18) or § 207. It likewise violates the requirement of the National Transportation Policy that the Commission fairly and impartially regulate the competing transport modes here involved. And in so doing it gives its stamp of approval to the very evil which it pointed out in its first decision (J. S. 52)—it enables Motor Transport (or any other railroad motor subsidiary in a similar situation) to "obviate the showing . . . of special circumstances . . . by the simple expedient of publishing a tariff . . ."

V

Conclusion

For the reasons set forth herein, as well as in our Jurisdictional Statement, this Court should note probable jurisdiction, reverse the decision of the court below, and remand the case to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

PETER T. BEARDSLEY
RICHARD A. MEHLEY
NELSON J. COONEY
1616 P Street, N.W.
Washington, D.C. 20036
Counsel for Appellant

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 28th day of April, 1967, I served copies of the foregoing document on the several parties herein, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with postage prepaid, to Honorable Thurgood Marshall, Solicitor General, Honorable Donald F. Turner, Assistant Attorney General, Howard E. Shapiro, Esq., and Jerry Z. Pruzansky, Esq., Department of Justice, Washington, D. C. 20530; and David G. Bress, United States Attorney for the District of Columbia, Washington, D. C.;

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Leonard S. Goodman, Esq., Assistant General Counsel, at the offices of the Commission, Washington, D. C. 20423;

3. On New York Central Transport Co., intervening defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its counsel, Herbert Burstein, Esq., 160 Broadway, New York, N. Y., and Joseph Rotwein, Esq., 1500 Massachusetts Ave., N. W., Washington, D. C.;

4. On Rock Island Motor Transit Company, intervening defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its counsel, Martin L. Cassell, Esq., and Thomas J. Megan, Esq., 139 W. Van Buren Street, Chicago, Illinois; and Walter J. Myskowski, Esq., 712 Ring Building, 1200 18th Street, N. W., Washington, D. C.

PETER T. BEARDSLEY

Affidavit of William A. Bresnahan

My name is William A. Bresnahan, and I am Managing Director of American Trucking Associations, Inc. (ATA). I am head of its staff, and have been since July 1, 1964. I have been continuously employed by ATA since February, 1938, in various capacities, including that of Director of Research, and Assistant Managing Director, except for the period from October, 1957, through September, 1960, when I was general manager of the National Automobile Transporters Association, an ATA Conference. ATA is the only nationally recognized representative of the organized trucking industry in the United States.

ATA is a national federation of fifty affiliated state trucking associations, each representing all classes and types of truck operation, and twelve conferences, each of which represents a special class or type of truck operation. As provided in the ATA By-Laws (Article VI):

> The membership of this corporation shall be composed of those engaged in the transportation of freight, express or mail by highway vehicles, together with such other persons as may be engaged in allied industries and all of whom are members of some one of the several affiliated associations, each member exercising the right of franchise in this corporation through such affiliated association in the manner determined by such association for the election of its Directors to American Trucking Associations, Inc.

ATA was incorporated under the laws of the District of Columbia on September 22, 1933, as a non-profit corporation. The following paragraph, contained in its certificate of incorporation, describes its purposes and functions:

> The particular business and objects of this corporation shall be, the education of those engaged in the industry of transporting property by means of motor vehicles, teams and drays on matters affecting the

operation of such motor vehicles, teams and drays, including safety facilities, safety devices and laws governing such operation, and otherwise. The purposes shall further be the mutual improvement and advancement of the interests of those engaged in such industry throughout the limits of the United States.

ATA staff activities are undertaken pursuant to the direction of its Board of Directors and Executive Committee, composed almost entirely of owners and officers of trucking companies located in all of the states and the District of Columbia. Among other activities, the staff is required, by direction of these governing bodies, to participate "in any proceeding wherein a railroad or its affiliate has applied for motor carrier authority which appears to exceed a bona fide auxiliary and supplemental service or which otherwise is deemed contrary to the expressed Congressional intent respecting rail operation of motor vehicles."

ATA, along with the National Motor Freight Traffic Association (NMFTA), participates in the compilation of the National Motor Freight Classification, which is solely owned by ATA, and which is filed with the Interstate Commerce Commission, Federal Maritime Commission, forty-six State regulatory commissions and three Canadian provinces. The Classification governs the rates charged by the approximately 5,300 motor carriers party thereto for the transportation of various commodities between points and places within the United States. ATA, under its agreement with NMFTA, can, on specified notice, resume publication of the classification as agent for the participating carriers.

ATA is the sole owner and publisher of the Motor Carriers' Explosives and Dangerous Articles Tariff, containing regulations promulgated by the Interstate Commerce Commission governing the transportation of explosives and other dangerous articles. Almost 4,000 motor car-

riers participate in this tariff. Although the number of commodities classified as "explosives" is relatively small, the number of so-called "dangerous articles" is quite large, comprising literally thousands of commodities. The Interstate Commerce Commission, by its Tariff Circular MF-No. 3, requires motor carriers authorized to transport explosives and other dangerous articles to publish, in tariff form, its rules governing such transportation. Through the medium of the Explosives and Dangerous Articles Tariff, ATA performs this obligation on behalf of the carriers party thereto.

ATA regularly participates in proceedings before the Interstate Commerce Commission, and occasionally before the federal courts, as a representative of the organized trucking industry and the regulated motor carriers which comprise it. Examples of proceedings before the Commission, of great importance to the trucking industry generally, in which ATA has recently participated, are: Ex Parte No. 230, *Substituted Service—Charges and Practices of For-Hire Carriers And Freight Forwarders*, involving the promulgation of rules to govern carrier practices in connection with trailer-on-flat-car (piggyback) transportation in interstate commerce; Docket No. 33440, *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains And Motor Vehicles*, an investigation into the causes of accidents of the type referred to in the title; and Docket No. MC-F-8505, *Lasham Cartage Co. and United States Freight Co.—Control —Seatrain Lines*, involving an effort by a holding company controlling almost forty percent of the freight forwarder traffic in the United States to acquire control of one of the two remaining Atlantic-Gulf Coast water carriers of property. Over the years, ATA has participated in literally hundreds of proceedings, of varying degrees of importance to the trucking industry, before the Commission.

Examples of court cases in which ATA has participated because of their importance to the organized trucking industry generally are: *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534 (1940), involving the question of exemption of employees of interstate motor carriers from the overtime provisions of the Fair Labor Standards Act; *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298 (1952), involving the validity of rules prescribed by the Interstate Commerce Commission to govern the leasing and interchange of equipment by motor carriers subject to its jurisdiction; *Frozen Food Express, Inc.* v. *United States*, 148 F. Supp. 399 (1956), aff'd. *sub nom.*, *American Trucking Associations, Inc.* v. *Frozen Food Express*, 355 U.S. 6 (1957), involving the question of the exemption from economic regulation by the I.C.C. under the provisions of Section 203(b)(6) of the Interstate Commerce Act of numerous categories of agricultural and meat and poultry products.

Examples of court cases in which ATA has participated in an effort to uphold the Congressional policy against rail entry into the field of motor transportation are: *American Trucking Associations, Inc.* v. *United States*, 326 U.S. 77 (1945), involving an order of the Interstate Commerce Commission granting numerous applications of the Seaboard Air Line Railway Co. to perform motor carrier service; and *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960), involving an order of the I.C.C. granting unrestricted motor-carrier rights to the wholly-owned subsidiary of the Southern Pacific Co.

ATA regularly represents the organized trucking industry of the United States before committees of the Congress dealing with proposed legislation of general interest to motor carriers of property, e.g., in the fields of highway taxation and federal size and weight standards, amendments to the Interstate Commerce Act, and coverage of motor-carrier employees under the Fair Labor Standards Act.

In addition to the activities heretofore referred to, ATA represents the trucking industry in several organizations whose activities are directly sponsored by, or closely coordinated with, agencies of the federal government other than the Interstate Commerce Commission.

ATA, on behalf of the motor-carrier industry of the United States, has entered into an "understanding" with the Military Traffic Management and Terminal Service (MTMTS) to provide "a basic foundation for the immediate and efficient utilization of commercial motor freight transport by *all* the military services (as represented by MTMTS) during mobilization, war, national or other emergencies." A similar understanding between A.T.A. and the General Services Administration is nearing execution. Under this agreement, ATA, as the national representative of the trucking industry, will cooperate with the government agency on a similar basis and for the same purpose with respect to government transportation (other than military) as set forth in the current understanding with MTMTS.

The Office of Emergency Transportation Unit of the new Department of Transportation is charged with the obligation to prepare a national plan for emergency preparedness, as a part of the national plan for civil defense and defense mobilization, under the direction of the Office of Emergency Planning. An executive reserve corps has been established by the Office of Emergency Transportation, for the purpose, among other things, of allocating transportation facilities in the event of war or other national emergency. ATA participates in the work involved as the representative of the organized trucking industry in the United States.

The President's Committee For Traffic Safety, established April 13, 1954, is composed of eighteen members appointed by the President from various walks of life. The Secretaries of Defense, Commerce, Labor, and Health,

Education and Welfare serve as *ex officio* members of the Committee. The Committee, on behalf of the President, is required, among other things, "to promote State and community application of the Action Program of traffic safety measures established by the President's Highway Safety Conference . . . [and to] develop effective citizen organization in the States and communities in support of public officials with Action Program responsibilities." Executive Order No. 10858, 25 F.R. 373 (1960). I am a member of the Committee's Advisory Council as well as its Executive Committee. In addition, ATA participates in the work of the Committee as the representative of the organized trucking industry through the Director of its Safety Department, who has been Chairman of two committees of the Advisory Council of the President's Committee for Traffic Safety (the Ad Hoc Committees on Driver Education and Government Employee Safe Driving Standards), and is a member of the Planning Committee of the Advisory Council.

The National Traffic and Motor Vehicle Safety Act of 1966, Public Law 89-563, provides, among other things, for the establishment of a National Motor Vehicle Safety Advisory Council (15 U.S.C. § 1393), and provides that the Secretary of Commerce "shall consult with the Advisory Council on motor vehicle safety standards," which the Secretary is empowered to establish. Jurisdiction over these provisions of law were transferred to the Secretary of Transportation by Public Law 89-670, establishing the Department of Transportation. The Advisory Council referred to has been appointed, and one of its members is the Director of ATA's Engineering Department.

The Highway Research Board operates under the auspices of the National Academy of Science-National Research Council, and receives financial support from private industry, and, in the form of research grants, from the States and the United States Bureau of Public Roads.

The membership of the Board's Executive Committee includes, *ex officio*, the Federal Highway Administrator and the Executive Secretary of the American Association of State Highway Officials. ATA represents the organized trucking industry in the work of the Board, through membership of several members of its staff on various project committees of the Board. ATA's Research Counsel is a member of the Board's Committees on Economics of Motor Vehicle Size and Weight and Intercity Highway Freight Transportation. The Director of ATA's Engineering Department is a member of the Board's Vehicle Characteristics Committee. In addition, the Director of ATA's Safety Department is a member of the Board's Highway Safety Research Committee.

Washington)
) ss.
District of Columbia)

William A. Bresnahan, being duly sworn, on his oath says that he is the Managing Director of American Trucking Associations, Inc., a corporation organized and existing under the laws of the District of Columbia, and that the matters and facts set forth in the foregoing affidavit are true.

/s/ William A. Bresnahan

Subscribed and sworn to before me, this twenty-sixth day of April, 1967.

(SEAL)

/s/ Harry E. Boot
Notary Public, D.C.

My Commission Expires Feb. 14, 1969

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

AMERICAN TRUCKING ASSN., INC. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 1046. Decided May 15, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.